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No. 03-811

In the Supreme Court of the United States

PETER J. MINIEL,

Petitioner,

v.

JANIE COCKERELL, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in finding that trial counsel's failure to investigate Mr. Miniel's mental functioning and, as a result, failure to discover evidence that Mr. Miniel was suffering from a significant brain impairment, was consistent with prevailing professional norms, notwithstanding counsel's knowledge of facts that should have put him on notice of the need to investigate further?

2. Whether the Fifth Circuit unreasonably applied *Strickland v. Washington* and *Strickland's* progeny, including *Wiggins v. Corcoran* and *Williams v. Taylor*, in concluding that trial counsel's failure to offer mitigating evidence of Mr. Miniel's physical and emotional abuse at the hands of his step father, his abuse of drugs and alcohol, and brain damage which impaired his reasoning abilities, did not cause Mr. Miniel to suffer prejudice in the sentencing phase of his capital murder trial?

3. Whether the Fifth Circuit's rejection of Mr. Miniel's *Penry* claim was based on an improperly limited reading of this Court's decisions in *Penry I* and *Penry II*?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit:

Peter J. Miniel was Petitioner-Appellant, below. Janie Cockerell, Director of the Texas Department of Criminal Justice, Institutional Division, was Respondent-Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Peter J. Miniel respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 339 F.3d 331 (5th Cir. 2003), and is reprinted at Pet. App. A-1 to A-28. The decision of the United States District Court for the Southern District of Texas is unreported and relevant excerpts are reprinted at Pet. App. A-33 to A-68. The order of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing *en banc*, is set forth at Pet. App. A-29 to A-30.

JURISDICTION

The Court of Appeals' judgment was entered on July 17, 2003. A timely petition for rehearing and rehearing *en banc* was filed and was subsequently denied on August 18, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. A-32.

STATEMENT OF THE CASE

A. Mr. Miniel's Trial Proceedings

On October 7, 1988, Mr. Miniel was convicted of capital murder in connection with the death of Paul Manier. During the sentencing phase of the trial, the State presented the testimony of five witnesses, four of whom testified concerning Mr. Miniel's criminal history during the time that he lived in Illinois, prior to moving to Texas, which consisted of a misdemeanor convictions for retail theft and disorderly conduct, a guilty plea to an aggravated battery in connection with an altercation with a girlfriend, revocation of probation on a misdemeanor charge of unlawful use of weapons (which revocation was based on his guilty plea to aggravated battery), and a subsequent unadjudicated charge of aggravated battery, again relating to an altercation with his girlfriend. The fifth State's witness, an officer with the Humble Police Department of Humble, Texas, testified regarding Mr. Miniel's bad reputation in the community for violence.

Mr. Miniel's trial counsel presented only three witnesses at the sentencing phase, none of whom had known Mr. Miniel prior to the crime. One of these witnesses, Darryl Hendrickson, an officer working in the Harris County Jail, testified that Mr. Miniel had not presented any disciplinary problems during his incarceration. The second witness, Carol Weed, was a venireperson who had not been selected for Mr. Miniel's jury and who had visited Mr. Miniel several times while he was in jail. The third witness, Juan Cortez, an assistant chaplain working at the jail, testified regarding Mr. Miniel's attendance at church services. The record reflects that Mr. Miniel's trial counsel first spoke with both Ms. Weed and Mr. Cortez only the day before they testified.[1]

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[1] 28 S.F. at 94, 104.

On October 12, following the two-day sentencing hearing, the jury returned affirmative answers to the two special issue questions then required under Texas law.

B. Trial Counsel's Failure to Investigate and Present Mitigating Evidence

In this case, trial counsel failed to perform any investigation whatsoever of his client's social history. Mr. Miniel's trial counsel presented only three witnesses at the sentencing phase, none of whom had known Mr. Miniel prior to the crime and two of whom counsel first spoke with only the night before they testified. Thus, Mr. Miniel's jury did not hear any evidence about the circumstances of Mr. Miniel's life before the crime that could help to explain his involvement and render that involvement in a less culpable light.

The record developed in post-conviction proceedings in state court establishes that there was ample mitigating evidence available, had counsel only looked for it. Had Mr. Miniel's trial counsel performed any investigation at all he would have discovered the following, all of which was presented in support of Mr. Miniel's petition:

- That Mr. Miniel suffered from a brain impairment, including significant dysfunction in the frontal lobes of his brain;

- That Mr. Miniel's brain dysfunction severely limited his ability to comprehend the consequences of his actions;

- That Mr. Miniel's disabilities were exacerbated by parental neglect, abandonment, abuse, many head injuries, and chronic substance abuse;

- That Mr. Miniel was a victim of severe child abuse by his adoptive father who beat Mr. Miniel with his fists and whipped him with a belt;

- That Mr. Miniel was born to a mother who did not want him and who immediately pawned him off on the first relative she could find;

- That Mr. Miniel never knew his natural father and that his adoptive father, the only father he ever did know, made Mr. Miniel the family scapegoat;

- That Mr. Miniel and his adoptive siblings were frequently left alone, either at home or sitting in the car, while their mother was at work and their father was getting drunk;

- That Mr. Miniel's adoptive mother suffered from extended bouts of serious mental illness throughout his childhood;

- That each of Mr. Miniel's siblings attempted suicide at least once;

- That, upon finding out at age twelve that he was adopted, Mr. Miniel experienced a radical personality change, which reflected itself in hostility and anger as well as alcohol and drug abuse;

- That, while in his early teens, Mr. Miniel frequently drank until he passed out;

- That Mr. Miniel's drug and alcohol abuse interfered with his ability to learn and that he dropped out of school at age 16;

- That Mr. Miniel's alcohol and drug use continued to escalate through Mr. Miniel's teens and into his early twenties;

- That Mr. Miniel was seriously injured in a number of automobile accidents.

One of Mr. Miniel's sisters recounted a harrowing description of one beating that Mr. Miniel suffered at the hands of his adoptive father:

> John [one of Mr. Miniel's adoptive brothers] told my father that Peter had hurt his feelings. My father became enraged and jumped on top of Peter. He pinned Peter's arms to the floor by kneeling on them. He then started hitting Peter across the face over and over again until Peter's face was covered with blood. Peter was only about 10 years old at this time. I finally yelled out for my father to stop. I thought he was going to kill Peter. I have never seen anyone else be beaten like this.

Pet. App. A-117. Another sister recalls, "Other times, Dad would grab Peter's upper arm, pick him up, and hold him in the air while he beat him, either with his hand or a belt. I still remember the sight of Dad unhooking his belt, pulling it off, and beating Peter with it everywhere. Dad would shake Peter's arms so hard, while holding him in the air, that it seemed like, if he shook any harder, Peter's arm would just snap off." Pet. App. A-141.

In addition to the affidavits of Mr. Miniel's family members describing his childhood and early adulthood – properly described as "nightmarish" – Mr. Miniel also presented an expert neuropsychological and psychological evaluation. Pet. App. A-97 to A-112. The report of that evaluation concluded:

> The current evaluation indicates that Peter has incurred mild overall brain impairment, has below average intellectual functioning, has a long history of physical and emotional abuse and abandonment, and has a lengthy history of chronic substance abuse. The effects of this history and his neuropsychological dysfunction would be consistent with moderate impairment of his mental, cognitive, academic, social, and behavioral functioning. The diffuse nature of his neuropsychological dysfunction limits his ability to use good judgment, to reason and to inhibit impulsive behaviors.

Pet. App. A-97. The expert report found Mr. Miniel to have a significant dysfunction in the frontal lobes of his brain, noting that damage to the frontal lobes severely limits a person's ability to think, reason, and control impulses, and stating that, "These severe limitations hinder Peter's ability to comprehend the consequences of his actions." Pet. App. A-110. Further, the report put Mr. Miniel's brain damage in the context of his social history in a way that would support a conclusion of diminished culpability for the crime:

> The results and background data indicate a high probability that Peter has neuropsychological impairment that is probably a result of his two closed head

> injuries as well as beatings to the face and head in childhood. Possibility of prenatal damage also exists since his mother was chemically dependent during the pregnancy. His disabilities have been exacerbated by parental neglect, abandonment, abuse, his many head injuries, and chronic long term substance abuse. Any single one of these factors can produce significant dysfunction. Child neglect and abuse often lead to poor impulse control, poor frustration tolerance, and incapacitating personality functioning. Head injuries can frequently emulate similar dysfunction. Chronic drug abuse can also generally produce brain impairment.

Pet. App. A-111.

C. State Post Conviction Proceedings

Following the denial of direct appeals from his conviction, Mr. Miniel filed a petition with the state court for post conviction relief which included a claim of ineffective assistance of counsel arising from his trial counsel's failure to investigate and offer mitigating evidence. In support of his ineffective assistance of counsel claim, Mr. Miniel submitted affidavits of family members recounting his harrowing social history, as well as the expert neuropsychological and psychological evaluation described above. Mr. Miniel also requested an evidentiary hearing. The State, in response to Mr. Miniel's ineffective assistance of counsel claim, offered the affidavit of Mr. Miniel's trial counsel, who attempted to excuse his failure to perform even a rudimentary investigation of Mr. Miniel's social history.

Notwithstanding many disputed issues of fact, the state court did not grant, or, indeed, even rule on Mr. Miniel's request for an evidentiary hearing, but instead, requested, by way of an ex parte telephone call to the State, that the parties submit proposed findings. Following the parties' submission of their respective proposed findings, the district court judge, who was not the judge who presided at Mr. Miniel's trial, signed the Findings prepared by the State, adopting those Findings without any modification – indeed, without even removing the words "Respondent's Proposed" from the title of the document. The Texas Court of Criminal Appeals, in a page and a half, eight sentence, per curiam decision, adopted the district court's recommended decision and denied Mr. Miniel's petition without any substantive analysis.

D. Mr. Miniel's Federal Habeas Petition

Following the state court's denial of his petition for post conviction relief, Mr. Miniel filed his application with the federal court, seeking relief pursuant to 28 U.S.C. § 2254. In connection with that application, Mr. Miniel again requested an evidentiary hearing. The lower court, however, granted the State's motion for summary judgment, dismissing Mr. Miniel's claims, and subsequently denied Mr. Miniel's motion to amend or alter judgment.

E. The Fifth Circuit's Denial of COA

Following the federal district court's grant of summary judgment denying Mr. Miniel's petition for post conviction relief, Mr. Miniel petitioned the Fifth Circuit for Certificate of Appealability ("COA"), pursuant to 28 U.S.C. 2253(c). In that petition, Mr. Miniel sought leave to appeal on the ground, among others, that his trial counsel's failure to investigate and present mitigating evidence constituted constitutionally ineffective assistance of counsel which

established a substantial showing of the denial of a constitutional right.

The Fifth Circuit recognized that Mr. Miniel's ineffective assistance of counsel claim was governed by this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under *Strickland*, a party demonstrates ineffective assistance of counsel rising to the level of a Constitutional violation when that party demonstrates that counsel's performance failed to meet generally accepted standards of competence and that, but for counsel's ineffective performance, there exists a reasonable probability that the outcome of the case would have been different. 466 U.S. at 687.

In denying the COA, the Fifth Circuit found that Mr. Miniel's trial counsel was not constitutionally ineffective as a result of his failure to conduct an investigation into Mr. Miniel's damaged psychological condition because counsel was not sufficiently "on notice" of that condition. With respect to counsel's failure to investigate Mr. Miniel's social history, the court did not consider arguments relating to the first prong of *Strickland*, resting its decision, instead, solely on its conclusion that Mr. Miniel had failed to establish prejudice arising from the failure to present mitigating evidence. The lower court found that, in light of the facts of the crime, there was not a reasonable probability that, even had the mitigating evidence been presented, the jury would have decided differently. The court, in a footnote, addressed *Wiggins v. Smith*, __ U.S. __, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 128 S.Ct. 1495 (2000), two recent decisions in which this Court found ineffective assistance arising from counsel's failure to investigate and present mitigating evidence. The court rejected Mr. Miniel's reliance on those cases on the ground that the mitigating evidence proferred by Mr. Miniel in support of his claim for

post-conviction relief was "mild" when compared with the evidence in *Wiggins* and *Williams*.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT FAILED TO REASONABLY APPLY SUPREME COURT PRECEDENT IN CONCLUDING THAT MR. MINIEL'S TRIAL COUNSEL'S FAILURE TO INVESTIGATE MR. MINIEL'S MENTAL AND PSYCHOLOGICAL CONDITION DID NOT CONSTITUTE PROFESSIONALLY UNREASONABLE CONDUCT

Mr. Miniel's trial counsel did not retain any experts or otherwise perform any investigation of Mr. Miniel's mental and psychological condition. As discussed above, expert evidence presented in Mr. Miniel's post conviction case showed Mr. Miniel to be suffering from a serious brain impairment that "limit[ed] his ability to use good judgment, to reason and to inhibit impulsive behaviors." The Fifth Circuit concluded that counsel's failure to do any investigation of Mr. Miniel's mental functioning that would have uncovered this important mitigating evidence did not constitute professionally unreasonable conduct because counsel was not sufficiently "on notice" of the need to investigate. Pet. App. A-22. The lower court based this conclusion trial counsel's reliance on the fact that Mr. Miniel had been pronounced competent to stand trial and on trial counsel's claim that Mr. Miniel has been "lucid and conversant" in their meetings. *Id.* This conclusion is contrary to this Court's teaching in *Strickland*, as further developed in *Williams* and *Wiggins*.

Under the first prong of the now-familiar *Strickland* test, a defendant claiming constitutionally ineffective assistance of counsel must show that counsel's representation

fell below an objective standard of reasonableness. 466 U.S. at 687-88. The Court has not established specific requirements to be used to determine objective reasonableness. Rather, "the proper measure of attorney performance remains simply the reasonableness under prevailing professional norms." *Id.* at 688. In order to comply with the Constitution's requirement that a sentence of death be based on an individualized sentencing determination, the jury must consider **all** mitigating evidence related to a defendant's character and background. *See Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910 (2001); *see also Williams*, 529 U.S. at 396 (recognizing counsel's "obligation to conduct a thorough investigation into the defendant's background," *citing* 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). Accordingly, minimum standards of professional competence require that counsel for an accused facing the death penalty conduct a thorough investigation to discover mitigating evidence that can be submitted to the fact-finder during the penalty phase of the trial.

Other circuits have similarly emphasized the fundamental nature, in a death penalty case, of an adequate inquiry into the availability of possible mitigating evidence. *See, e.g., Battenfield v. Gibson*, 236 F.3d 1215, 1228 (10th Cir. 2001) (reversing sentence of death based on finding that counsel's failure to interview the defendant or anyone else regarding potential mitigating evidence fell below minimum standards of professional competence and emphasizing that the reliability of a death sentence depends heavily on the consideration of the defendant's individual character and circumstances.); *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility.");

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000) (finding ineffective assistance of counsel when the defendant's lawyer made no attempt to investigate the defendant's childhood, made no attempt to convey the conditions of defendant's childhood to the jury and failed to present any medical evidence, despite being aware that such evidence would show that defendant was under the influence of PCP at the time of the crime, and his sole preparation for the penalty phase consisted of an interview with the defendant's mother and his estranged wife, and a cursory examination of the defendant's juvenile and medical records).

In *Wiggins*, this Court considered the circumstances under which counsel might, consistent with his or her constitutional responsibilities, decide to limit investigation regarding possible mitigating evidence. There, trial counsel's investigation of Wiggins' social history consisted of a review of a presentence investigation report and certain social services records as well as retaining a psychologist to perform an evaluation of Wiggins' mental functioning. Counsel failed to uncover evidence of a significant history of very severe physical and emotional abuse as well as borderline retardation. The Court held that the limited investigation conducted by counsel constituted a failure to discover all reasonably available mitigating evidence. 123 S. Ct. at 2537. Moreover, the Court found the content of the social services records that counsel did review should have caused counsel to investigate further and that counsel's failure to follow-up on this evidence was unreasonable, stating that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* Further, the Court noted:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of

> evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 2538. Accordingly, "[a] decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Id.* at 2541, *quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2052.

Here, there was ample evidence that should have put counsel on notice of the need to investigate. First, Mr. Miniel's trial counsel, in his affidavit submitted in opposition to Mr. Miniel's petition, observed, regarding Mr. Miniel's family members, that there was "a certain warmth missing in their feelings" for Mr. Miniel and that he was not certain whether Mr. Miniel's family would ask the jury to spare Mr. Miniel's life. Such observations should, by themselves, have been a red flag that something was seriously amiss in Mr. Miniel's family history. Even the very brief conversations that trial counsel now acknowledges having with Mr. Miniel's family should have led him to investigate further. Notwithstanding what should have been very troubling comments by Mr. Miniel's family, counsel states that he cannot now recall whether he ever asked about the possibility that Mr. Miniel had suffered abuse as a child.

Further, counsel should also have been aware, based on the State's competency opinion, if not from information from his own client, that Mr. Miniel had a history of heavy

drug and alcohol abuse. Counsel was also aware that Mr. Miniel was using drugs and alcohol on the night of the crime. These facts should have led counsel to investigate further to determine the extent to which Mr. Miniel's history of drug and alcohol abuse might be presented as mitigating evidence.

Neither counsel's own untrained observations concerning Mr. Miniel's mental state nor the competency examination by the State's expert, Dr. Brown, can be reasonably relied upon to excuse trial counsel's failure to investigate. Counsel, although he claims that he "never suspected that Miniel suffered from any mental health problems or mental retardation," does not claim that he has any training or expertise that would qualify him to make such a judgment. Such uninformed, off-the-cuff assessments plainly cannot substitute for investigation. Nor does Dr. Brown's evaluation excuse the failure to investigate. The purpose of Dr. Brown's examination of Mr. Miniel was to determine Mr. Miniel's competence to stand trial. The purpose of that examination plainly was **not** to assist defense counsel in developing mitigating evidence. To the extent that trial counsel relied on Dr. Brown's report in planning his trial strategy, such reliance was manifestly unreasonable and inconsistent with appropriate professional judgment.

II. IN LIMITING THE PREJUDICE ANALYSIS APPLIED IN *WIGGINS* AND *WILLIAMS* TO THE SPECIFIC FACTS IN THOSE CASES, THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE PROBABILITY THAT THE OMITTED MITIGATING EVIDENCE, TOGETHER WITH THE MITIGATING EVIDENCE THAT WAS PRESENTED, WOULD HAVE CAUSED ONE JUROR TO ANSWER ONE OF THE TWO SPECIAL ISSUE QUESTIONS IN THE NEGATIVE

In order to show that counsel's professionally unreasonable conduct resulted in prejudice, for purposes of the second prong of the *Strickland* analysis, the petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Here, one "no" vote by one juror to either of the two special issue questions would have changed the outcome from death to life. Thus, the proper prejudice analysis for a claim of ineffective assistance of counsel arising from the failure to investigate and present mitigating evidence asks whether there is a reasonable probability that the omitted evidence, together with the evidence that was presented, would have caused one juror to change his or her vote on one of the special issue questions. This is the analysis that this Court's precedents require and this is the analysis that the Fifth Circuit failed to apply.

In *Williams* and, just last term, in *Wiggins*, this Court addressed the proper application of the *Strickland* prejudice analysis, concluding, in both cases, that counsel's failure to investigate and present evidence of a history of child abuse

and impaired mental functioning resulted in prejudice. The evidence supporting Mr. Miniel's ineffective assistance of counsel claim makes this case materially indistinguishable from *Williams* and *Wiggins*. Here, as in *Williams* and *Wiggins*, the jury heard nothing of Mr. Miniel's circumstances prior to his participation in the crime. Here, as in *Williams* and *Wiggins*, counsel failed to investigate and present evidence of a disadvantaged background beyond Mr. Miniel's control, including physical abuse and limited mental functioning. Here, as in *Williams* and *Wiggins*, the omitted mitigating evidence tells a powerful story that would have humanized Mr. Miniel before the jury and diminished his culpability. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934 ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse.'"); *see also*, *Skipper v. South Carolina*, 476 U.S. 1, 13, 106 S.Ct. 1669 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) ("[s]ociety's legitimate desire for retribution is less strong with respect to defendants who have reduced capacity for considered choice[;]. . . [e]vidence concerning the defendant's emotional history thus bear[s] directly on the fundamental justice of imposing capital punishment."); *Frazier v. Huffman*, 343 F.3d 780, 798 (6th Cir. 2003) (applying *Strickland* and *Williams* in concluding that defendant was prejudiced by counsel's failure to investigate and present evidence of defendant's functional brain impairment, stating, "Had the jurors been confronted with the mitigating evidence of Frazier's brain injury, the probability that at least one juror would not have decided that the aggravating circumstances beyond a reasonable doubt 'is a probability sufficient to undermine confidence in the outcome.'")

In *Williams*, trial counsel failed to conduct an investigation that would have uncovered extensive records of Williams' "nightmarish childhood," including evidence that Williams' parents had been imprisoned for criminal neglect of Williams and his siblings and that Williams had been repeatedly beaten by his father. 529 U.S. at 395. Further, counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and had not advanced beyond sixth grade. *Id.* Evidence also showed that Williams had suffered repeated head injuries and that he might have had mental impairments that were organic in origin. *Id.* at 370.

The Court had little trouble concluding that Williams' trial counsel's lack of investigation met the "deficient performance" prong of the *Strickland* test. *Id.* at 395. Turning to the prejudice prong, the Court emphasized the need to consider the totality of the evidence – including mitigating evidence that was introduced and mitigating evidence that counsel failed to discover – in determining whether there was a reasonable probability that the outcome would have been different. In concluding that Williams was prejudiced by his trial counsel's failure to investigate and present mitigating evidence, the Court observed that, while evidence of Williams' confession and remorse for his crime, together with evidence of Williams' good behavior in prison "may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

In *Wiggins*, the Court also found that the defendant had been prejudiced by his trial counsel's failure to perform a reasonably competent investigation of mitigating evidence, stating, "Petitioner thus has the kind of troubled history we

have declared relevant to assessing a defendant's moral culpability." 123 S. Ct. at 2542, *citing Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989). As in *Williams*, the Court emphasized the need to evaluate prejudice in light of evidence presented at trial and the evidence adduced in the habeas proceedings, taken together. *Id.* at 2543. Thus, the Court held:

> Wiggins' sentencing jury had only one significant mitigating factor – that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.

Id.

The Fifth Circuit's decision inappropriately limits both *Wiggins* and *Williams* to their specific facts by characterizing Mr. Miniel's mitigating evidence as "mild" when compared with the social history evidence presented in those cases. This, however, is not the proper comparison. Instead, the weight of the additional mitigating evidence (and the prejudice arising from trial counsel's failure to discover and offer it), must be determined in light of the other punishment and mitigation evidence in **this** case. The question, under *Williams* and *Wiggins,* is not whether the mitigating evidence is "better" or "worse" than the specific facts of those cases. Rather, the question is whether the available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of Mr. Miniel's moral culpability in light of the totality of the evidence. 123 S. Ct. at 2544. The lower court never addressed this question because it chose, instead, to read *Williams* and *Wiggins* so narrowly as to be limited to their specific facts.

The lower court concluded that the State's punishment phase evidence, consisting of Mr. Miniel's criminal record and the circumstances of the crime itself would have overwhelmed any mitigating evidence that Mr. Miniel could have offered. The Court rejected similar reasoning in *Williams*, where, unlike this case, the defendant had an extensive record of violent conduct. *See* 529 U.S. at 418 (Rehnquist, C.J., dissenting) (noting that Williams had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery and confessed to choking two inmates and breaking a fellow prisoner's jaw). The *Williams* Court found prejudice even in the face of this violent history.

Here, Mr. Miniel's criminal history does not reflect anything near this degree of violence. Mr. Miniel's criminal record, which the State presented in support of its death case, consisted of a misdemeanor convictions for retail theft and disorderly conduct, a guilty plea to an aggravated battery in connection with an altercation with a girlfriend, revocation of probation on a misdemeanor charge of unlawful use of weapons, based on his guilty plea to aggravated battery, and a subsequent unadjudicated charge of aggravated battery, again relating to an altercation with his girlfriend.

Further, the Fifth Circuit repeats the mistake of the court of appeals in *Williams* of failing to weigh the mitigating evidence that was omitted together with the evidence that was presented – which established Mr. Miniel's good behavior and religious conversion since his incarceration. The Court in *Williams* reasoned that, while evidence that was presented at trial concerning Williams' remorse and good behavior in prison may not have overcome a finding of future dangerousness, that evidence, together with "the graphic description of Williams' childhood filled with abuse and privation, or the reality that he was 'borderline mentally

retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. This same reasoning applies here.

Moreover, trial counsel's failure to conduct an investigation of Mr. Miniel's social history was prejudicial in still another way. The Fifth Circuit concluded that trial counsel's failure to obtain an expert evaluation of Mr. Miniel did not constitute deficient performance because trial counsel was not sufficiently "on notice" of Mr. Miniel's condition. However, had trial counsel performed an investigation of Mr. Miniel's social history, counsel would have learned that Mr. Miniel had suffered severe beatings and neglect as a child, that he began abusing drugs and alcohol at a very early age, that he had had difficulty in school, and that he had suffered a number of serious head injuries. These facts would have, at the least, spurred a reasonable attorney to retain an expert in order to evaluate the effects of Mr. Miniel's history on his mental functioning. Significantly, even the constitutionally deficient investigation in *Wiggins* included an evaluation by a psychologist.

Had this occurred, Mr. Miniel's jury would have been presented with a picture of Mr. Miniel as a whole person, in a way that would likely have caused it to hold him less responsible for his crime. Thus, the jury would have heard evidence of an extremely traumatic childhood that was not just tragic but that caused damage to Mr. Miniel's brain which in turn, limited Mr. Miniel's "ability to use good judgment, to reason and to inhibit impulsive behaviors." This evidence, together with the mitigating evidence that was presented, of Mr. Miniel's good behavior and religiousness while in jail, would have provided the jury with context that would enabled it to answer in the negative as to either the "deliberateness" of Mr. Miniel's crime or his future dangerousness.

III. THE FIFTH CIRCUIT ERRED IN ITS APPLICATION OF THIS COURT'S DECISION IN *PENRY*

In addition to his ineffective assistance of counsel claim, Mr. Miniel also sought COA on the ground that the special issues in effect in Texas at the time of his trial unconstitutionally deprived him of the opportunity to have the jury consider and give weight to mitigating evidence, contrary to this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). In rejecting Mr. Miniel's claim, the Fifth Circuit stated that, "The Court [in *Penry II*] did not indicated that we have misinterpreted what constitutes *Penry* evidence." Pet. App. A-7. This Court has recently granted cert in two cases, *Smith v. Dretke*, No. 02-11309, and *Tennard v. Dretke*, 02-10038, in which the Court will review whether the Fifth Circuit has correctly applied *Penry I* and *Penry II*. Mr. Miniel respectfully urges the Court to delay any determination in this case pending a decision in those cases.

IV. THE FIFTH CIRCUIT'S DENIAL OF COA DESPITE SIGNIFICANT EVIDENCE SUPPORTING MR. MINIEL'S CLAIM REPRESENTED AN UNREASONABLE APPLICATION OF THIS CORRECT STANDARD ARTICULATED BY THIS COURT IN *MILLER-EL*

The relevant inquiry, for purposes of determining whether to grant COA with respect to a claim, is whether jurists of reason would find the district court's determination of the claim debatable or wrong. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003). This is emphatically not the same as determining whether the petitioner is likely to ultimately prevail on the merits. Indeed, the *Miller-El* Court

stated, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 123 S. Ct. at 1040. Thus, reading *Wiggins* and *Miller-El* together, the question presented by this case is whether, taking the totality of the punishment evidence, including the evidence adduced at trial and the evidence presented in post conviction proceedings, there is a reasonable likelihood that one juror would have answered one of the special issue questions in the negative.

Further, the *Miller-El* Court clarified the applicable evidentiary standard used to determine whether the necessary threshold has been met. Noting that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," the Court stated:

> In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by **any evidence** demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. . . . Only after a COA is granted will a reviewing court determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary.

123 S. Ct. at 1041 (emphasis added). The lower court, although paying lip service to *Miller-El*, failed to apply it.

The evidence presented in support of Mr. Miniel's petition meets, at the least, this threshold.

CONCLUSION

On the basis of the foregoing arguments and authorities, Peter J; Miniel respectfully requests that his petition for writ of certiorari be granted.

Dated: November 17, 2003.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20097

PETER J. MINIEL,

Petitioner-Appellant,

VERSUS

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, DAVIS and CLEMENT, Circuit Judges.
W. EUGENE DAVIS:

Petitioner, Peter J. Miniel (Miniel), was convicted of capital murder in Texas and sentenced to death. He now seeks a Certificate of Appealability (COA) pursuant to 28 U.S.C. § 2253(c)(2) from the district court's denial of relief

under 28 U.S.C. § 2254 on the following claims: (1) the jury was precluded from considering mitigating evidence during sentencing; (2) he was denied the right to trial by an impartial jury; and (3) counsel rendered ineffective assistance by failing to conduct a pretrial investigation and present mitigating evidence during sentencing. For the reasons that follow, we deny COA on Miniel's claims.

I. BACKGROUND.

On October 7, 1998, Miniel was convicted of the felony murder of Paul Manier (Manier).

After arriving at Manier's house to procure marijuana, Miniel concocted a plan to rob him. Miniel's co-defendant, James Warren Russell, Jr. (Russell), distracted Manier by telling him he was going to get cocaine. Manier cleaned a small mirror to use to snort the cocaine. When Manier leaned over the mirror, Miniel struck him on the back of the head with a beer mug. Miniel continued to strike Manier until he fell to the ground. When Russell returned, he joined Miniel and struck Manier several times with a shock absorber that was nearby. Dissatisfied with Russell's efforts, Miniel took the shock absorber and began striking Manier with it. When Miniel could not knock out Manier, he stabbed Manier several times with a small knife. After this proved ineffective, Miniel attempted to slit his throat while Russell held him. Finally, Miniel attempted to asphyxiate Manier by shoving a blanket down his throat.

After the murder, Miniel became angry when he realized that he had killed Manier for only twenty dollars. Miniel and Russell searched the apartment for drugs or money but all they could find to steal was stereo equipment. They washed off Manier's blood and hid the knife. Afterwards, Miniel and Russell went to Burger King to eat hamburgers.

A jury convicted Miniel of capital murder.On October 12, 1988, the jury returned affirmative answers on two special issues required for imposition of the death penalty under Texas law, and the trial court sentenced Miniel to death.

Miniel appealed his conviction to the Texas Court of Criminal Appeals which affirmed his conviction and sentence. Miniel v. State, 831 S.W.2d 310 (Tex. Crim. App. 1992). The United States Supreme Court denied his application for a writ of certiorari. Miniel v. Texas, 506 U.S. 885, 113 S.Ct. 245 (1992). Thereafter, Miniel sought post-conviction relief in state court, filing a petition for a writ of habeas corpus in 1993 and an amended petition in 1996. Judge Larry Fuller, who was not the trial judge, presided over this proceeding. The state filed its answer in March 1999. Both sides filed affidavits, and without conducting an evidentiary hearing, the state district court requested that the parties submit proposed findings of fact and conclusions of law. The state district court adopted the State's proposed findings of facts and conclusions of law and denied relief. The Texas Court of Criminal Appeals adopted this order in December 1999.

Thereafter, Miniel sought post-conviction relief in federal district court pursuant to 28 § U.S.C. 2254. The district court granted the State's motion for summary judgment in October 2001. The district court denied Miniel's motion to alter or amend the judgment. The district court also denied Miniel's request for a COA. Miniel now seeks a COA from this court.

II. STANDARD OF REVIEW.

Miniel filed the instant Section 2254 application for habeas relief after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA).

His application is therefore subject to the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 336,117 S.Ct. 2059, 2068 (1997).

Under the AEDPA, an appeal may not be taken to this court unless the petitioner first obtains a COA. 28 U.S.C. § 2253(c)(2). "This is a jurisdictional prerequisite because the COA statute mandates that `[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . . '" *Miller-El v. Cockrell*,123 S.Ct.1029,1039 (2003) (citing 28 U.S.C. §2253(c)(1)) . "The COA statute requires a threshold inquiry into whether the circuit court may entertain an appeal." *Id.* (*citing Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *Hohn v. United States*, 524 U.S. 236, 248 (1998)). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4,103 S.Ct. 3383, 3394 n. 4 (1983) (citation and internal quotation marks omitted). Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir.1997).

The analysis "requires an overview of the claims in the habeas petition and a general assessment of their merit." *Miller-El v. Cockrell*,123 S.Ct.1029,1039. We must look to the district court's application of AEDPA to the petitioner's constitutional claims and determine whether the court's resolution was debatable among reasonable jurists. *Id.* "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* Rather, "'[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the

constitutional claims debatable or wrong.'" Id. at 1040. (citing Slack v. McDaniel, 529 U.S. 473, 484).

In making this assessment, we must be mindful of the deferential standard of review the district court applied to Miniel's claims as required by AEDPA. *Hill v. Johnson*, 210 F.3d 481, 48485 (5th Cir. 2000). Section 2254(d) requires a federal district court to give deference to determinations by a state habeas court that adjudicated the petition on the merits. *See Hill v. Johnson*, 210 F.3d 481, 484-85 (5th Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), the district court defers to a state court's adjudication of a petitioner's claims on the merits unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362,120 S.Ct.1495,1519-20 (2000). A state court's decision constitutes an unreasonable application of clearly established federal law if it is objectively unreasonable. Id. at 1521.

III. MITIGATING EVIDENCE.

A. Denial of Mitigating Evidence Instruction

Miniel argues that the state court denied a jury instruction with respect to the following mitigating evidence in violation of the Eighth Amendment: his drug and alcohol use at the time of the offense; his youth (age 23); his good

behavior while incarcerated; and his religious conversion.[1] Finding Miniel's claim precluded by precedent, we deny a COA.

In *Penry I*, the Supreme Court reversed a death sentence on the ground that, although the evidence regarding the defendant's mental retardation and childhood abuse was presented to the jury at the penalty phase of the trial, the special issues prescribed by Texas statute prevented the jury from giving mitigating effect to that evidence. *Penry v. Lynaugh*, 492 U.S. 302, 328,109 S.Ct. 2934, 2952 (1989). Since the holding in *Penry*, federal courts have had the opportunity to determine whether the special issues provided a vehicle for considering numerous types of mitigating evidence.

As in the instant case, the petitioner in *Tucker v. Johnson*, 115 F.3d 276, 281(5th Cir.1997), argued that the jury was prevented from considering the mitigating evidence of her intoxication at the time of the offense and her age, twenty-three. We rejected that claim and found that the petitioner had failed to make a substantial showing of the

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[1] Miniel also argues that the jury could not adequately consider the "mitigating" evidence of his co-defendant's lesser sentence. The Supreme Court has explained that mitigating evidence involves any aspect of the defendant's character or record and a circumstance of his offense. See Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874 (1982). A co-defendant's lesser sentence does not constitute a mitigating factor as defined by the Supreme Court. Cf. United States v. Ives, 984 F.2d 649, 650 (5th Cir.1993) (relying on the Supreme Court's capital jurisprudence, we have concluded that substantially lesser sentences received by a defendant's coconspirators did not constitute a mitigating circumstance that might warrant downward departure from guidelines sentence).

denial of a federal right. Id. at 281-82. More specifically, a jury can give "full effect" to evidence of voluntary intoxication in its determination whether the defendant acted deliberately, which is contained in the first special issue. *Lackey v. Scott*, 28 F.3d 486, 489 (5th Cin 1994). The second special issue with respect to future dangerousness affords the jury an adequate vehicle to consider the defendant's youth. *Johnson v. Texas*, 509 U.S. 350, 370,113 S.Ct. 2658, 2670 (1993).

With respect to the evidence of Miniel's good behavior while incarcerated, the Supreme Court has explained that no special instruction is necessary to enable the jury to consider the mitigating effect of the petitioner's evidence regarding his good prison disciplinary record. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2329-30 (1988). Finally, with respect to Miniel's religious conversion, this Court has held that the second special issue would allow the jury to give effect to mitigating evidence that a petitioner had "rededicated his life to God." *Jernigan v. Collins*, 980 F.2d 292, 295 (5th Cir.1992).

Accordingly, Miniel's claim that he was entitled to an instruction to allow the jury to give effect to his mitigating evidence is precluded by precedent. The Supreme Court's decision in Penry II does not indicate otherwise. *Penry v. Johnson* 121 S.Ct.1910 (2001). In *Penry II*, the Supreme Court found a supplemental jury instruction with respect to mitigating evidence to be "ineffective and illogical." Id. at 1924. Thus, the Court reached the same conclusion it had reached in *Penry I*: "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* The Court did not indicate that we have misinterpreted what constitutes *Penry* evidence.

We are therefore satisfied no reasonable jurist would find debatable the district court's resolution of Miniel's *Penry II* claim. Accordingly, we deny COA as to this claim.

B. Mitigating Evidence Not Before the Jury

Miniel also contends that the special issues effectively precluded the introduction of certain other mitigating evidence including: emotional trauma resulting from the circumstances in which he learned of his adoption; his alcoholic father; a long history of severe abuse as a child; a history of drug and alcohol abuse; a pattern of suicide attempts and substance abuse that affected virtually every member of his immediate family; and evidence of impairment of his mental, academic, social, and behavioral functioning. Miniel contends that without a proper instruction the jury would have had no vehicle through which to give effect to the mitigating weight of this evidence. This Court, however, has repeatedly rejected the claim that the "Texas statutory capital sentencing scheme is . invalid as preventing or chilling defense counsel's development of mitigating evidence." *Briddle v. Scott*, 63 F.3d 364, 378 (5th Cir.1995); *Crank v. Collins*, 19 F.3d 172,176 (5th Cir.1994); *Black v. Collins*, 962 F.2d 394, 407 (5th Cir. 1992); *May v. Collins*, 948 F.2d 162,166-68 (5th Cir.1991). Further, we have held that a "petitioner cannot base a *Penry* claim on evidence that could have been but was not proffered at trial." *Boyd v. Johnson*, 167 F.3d 907, 912 (5th th Cir. 1999) (*citing West v. Johnson*, 92 F.3d 1385, 1405 (5th Cir.1996)). We are constrained to find that Miniel has not made a substantial showing of a constitutional right with respect to his *Penry* claim.

IV. DENIAL OF IMPARTIAL JURY.

Miniel also argues that he was denied his Sixth Amendment right to an impartial jury. The Sixth Amendment right to a fair trial includes the right to an impartial jury.

Morgan v. Illinois, 504 U.S. 719, 727,112 S.Ct. 2222 (1992). In a capital sentencing context, a defendant has the right to challenge for cause a juror whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424,105 S.Ct. 844, 852 (1985). A state trial court's refusal of a petitioner's challenge for cause is a factual finding entitled to a presumption of correctness. *Jones v. Butler*, 864 F.2d 348, 362 (5th Cir.1988). Here, the state habeas court "found based on a review of the trial record that the trial court did not err in failing to excuse venire person Patrick O'Rourke for cause because he clearly demonstrated that he understood the legal definitions, was fully capable of following the law, and fairly and impartially answering the punishment issues."

The juror in question, Patrick O'Rourke, had an MBA from the University of Houston and was a comptroller for a corporation. Miniel argues that O'Rourke expressed such an extreme bias in favor of the prosecution and the death penalty that it disqualified him from being seated as an impartial juror. In support of this argument, Miniel quotes several statements O'Rourke made while being examined during voir dire. First, Miniel asserts that O'Rourke demonstrated his bias by expressing the view that he would not worry about whether the death penalty was right or wrong in a particular case because the decision to execute a convicted defendant is "more or less a mechanical process." During voir dire, in response to the prosecutor's question whether it would "bother" him to be limited to only two choices of punishment (life or death sentence), O'Rourke responded as follows:

> No. I mean what it is what it is. I don't - at that point it's not the point to be worrying about, whether or not it's right or wrong. It probably is good. Like I said, it's become *more or less a mechanical process that you make these decisions.*

And this is the result of those decisions: more or less yes-or-no-type.

We do not read O'Rourke's use of the phrase "more or less mechanical process" as evidencing bias. Instead, we understand O'Rourke's use of the phrase "more or less a mechanical process" as describing the Texas procedure that determines whether a life sentence or death sentence is imposed. The prosecutor explained that, under the statutory scheme, if the issues are answered affirmatively the defendant will be sentenced to death. If there is a negative answer to either question the defendant will be sentenced to life imprisonment. We note that the prosecutor informed O'Rourke that if the jury answered the special answers "yes," an "automatic death verdict" resulted. Webster's Dictionary provides that the word "automatic" is a synonym for "mechanical."[2] Clearly, the jurors' answers to the special issues "automatically" determine the sentence imposed. Accordingly, we are not persuaded that O'Rourke's use of the phrase "more or less mechanical process" when describing the statutory scheme gives rise to debate regarding potential bias.

Miniel also points to various other statements made by O'Rourke during voir dire in support of his claim of bias, including the following: (1) he believed that because the "justice system is just all drawn-out" and that "if you speeded up the process, a few innocent might die; but society, as whole, might be better off'; (2) his "personal feelings [are] that we're probably a little too lenient ... [and] society has pretty much reined [in] its use";. (3) he did not feel "inclined" to mitigate punishment[3] and thought that "society has the

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[2] WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY(1984).

[3] We note that on the juror questionnaire O'Rourke *disagreed* with the following statement as an absolute: "A person is

obligation to remove persons who are a danger to society as a whole."

After reading the record, it is clear that O'Rourke held a strong *personal* preference for the death penalty as a punishment for those convicted of capital murder.[4] Nonetheless, O'Rourke's answers also indicated that he understood the difference between his "personal feelings" and what Texas law provided.[5] Under those circumstances, Miniel did not rebut with clear and convincing evidence the state court's finding that O'Rourke "was fully capable of following the law and fairly and impartially answering the punishment issues." Accordingly, the district court's judgment denying this claim is not debatable or wrong.

Miniel further contends that O'Rourke should have been excused for cause because he could not distinguish between the term "intentional," which pertains to the mental state at issue during the guilt-innocence phase and the term "deliberate," which is contained in the first special issue at the punishment phase. The State does not dispute that a prospective juror should be excused if unable to distinguish between those two terms. This Court has noted that Texas law makes "'a distinction between intentional and deliberate

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always responsible for his or her acts, and there can be no circumstances that could mitigate his responsibility."

[4] During voir dire, the prosecutor asked O'Rourke to rate himself on a scale from 1 to 5 regarding his attitude toward capital punishment (the number 1 indicating totally opposed to the death penalty and the number 5 indicating strongly in favor of capital punishment as an appropriate penalty). O'Rourke said he would "be more towards the 4 to 5 range."

[5] O'Rourke stated that he understood that "the laws are laid down. You kind of have to operate within the laws."

conduct; deliberate conduct is something more than intentional, but less than premeditation. [The Texas Court of Criminal Appeals has] repeatedly recognized that a venire person who cannot distinguish between intentional and deliberate conduct is impaired in his ability to consider the first special issue, and is challengeable for cause.'" *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir.1998) (quoting *Soria v. State*, 933 S.W.2d 46, 60-61 (Tex. Crim. App. 1996)) (internal citation omitted). Nonetheless, Texas law does not require that venire persons find a "distinct" difference between the terms "intentional" and "deliberate." *Goff v. State*, 931 S.W.2d 537, 548 (Tex. Crim. App. 1996). Instead, it "only requires that venire persons find a difference between the two terms and be able to base their answers on the evidence presented." *Id.*

At the beginning of O'Rourke's voir dire examination, the trial court asked him if he had any "scruples" against the death penalty in a "proper case." O'Rourke responded negatively. The trial court then instructed O'Rourke as follows:

> I'm going to give you a definition of "intentionally" and "deliberately."
>
> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the - result.
>
> There's a different interpretation of the common meaning of "intentionally" and "deliberate' within the context of capital murder punishment hearing.

As used in the first Special Issue, the word "deliberately" has a meaning different and distinct from the word "intentionally." The word "deliberately," as used in the first Special Issue, means a manner of doing an act characterized by or resulting from careful consideration, a conscious decision involving a thought process which embraces more than mere will to engage in the conduct.

* * *

I do want to instruct you that in Texas, under the capital murder statute, there are several different types of capital murder offenses ....

The punishment for [capital murder] is life or death. Those are the only two punishments.

There's a difference between "intentional murder" - now, for intentional murder the punishment range is from five years to life. And in no case for just an ordinary intentional murder can a person be given [the] death penalty.

Do you understand that? It has to be some of these plusses. connected, like aggravated rape, like I mentioned; you understand?

A. [O'Rourke] Okay.

Subsequently, the prosecutor described a hypothetical capital murder to O'Rourke and inquired whether he understood the difference between "intentional" and "deliberate" conduct in that scenario. O'Rourke replied "Not really." The prosecutor inquired as follows: "I gather if you

believe that he intentionally shot and killed somebody with the intent of killing, causing a death, you're going to answer Issue No. 1 yes; the legal distinction between `intent' and `deliberate' doesn't have a whole lot of meaning to you[?]" O'Rourke responded that the "more you talk about it, the more commingled they become. That's what I have to admit." (emphasis added). O'Rourke also stated that the "words do start crossing over a lot, yea; so I'd have to say yes." The prosecutor further inquired: "If you find him guilty, odds are that Issue 1 is going to be a big yes?" O'Rourke responded "Odds are, yeah."

As set forth above, O'Rourke described the two terms as "crossing over a lot" and becoming "more commingled." However, these descriptions do not suggest that O'Rourke found the terms identical; instead, these descriptions suggest *some* difference (even if not distinct) between them. Moreover, his response that the "odds" were that he would answer yes to the first special issue after finding the conduct intentional certainly does not indicate that he would do so in every case.

As previously quoted, the state habeas court found "based on a review of the trial record that the trial court did not err in failing to excuse venireperson Patrick O'Rourke for cause because he clearly demonstrated that he understood the legal definitions, was fully capable of following the law and fairly and impartially answering the punishment issues." Because O'Rourke's responses indicated that he perceived some difference between the two terms and that he would base his answers on the evidence presented,[6] Miniel has not shown that O'Rourke was excusable for cause under Texas law. *Goff v. State*, 931 S.W.2d 537, 548. The district court was unpersuaded that Miniel has rebutted the state court's

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[6] O'Rourke expressly stated that he would answer the questions depending on the "facts and circumstances."

finding with clear and convincing evidence. Given the presumption afforded both the trial court and the state habeas court, we do not believe that the district court's decision was debatable or wrong. Accordingly, we find that Miniel has not made a substantial showing of the denial of a constitutional right with respect to this particular argument, and we deny COA on this basis.

Finally, Miniel contends that the prosecutor's remarks to O'Rourke during voir dire minimized the jury's responsibility for determining a sentence of death in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 104 S.Ct. 2633 (1985). Miniel argues that the prosecutor's remarks regarding the extensive, lengthy review of a death sentence by the courts would lead a juror to believe that the responsibility is delegated to the courts.

In *Caldwell*, the Supreme Court "conclude[d] that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328-29. Subsequently, in *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215 (1989), the Supreme Court explained that to "establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." During Miniel's state habeas proceedings, the trial court found "no evidence in the record to support [Miniel's] assertions that the State misstated the law in voir dire or impermissibly minimized the jury's responsibility for the death sentence."

To evaluate a *Caldwell* claim, this Court looks to the "'total trial scene,' including jury selection, the guilt phase of trial, and the sentencing hearing, examining both the court's instructions and counsel's argument to the jury." *Montoya v.*

Scott, 65 F.3d 405, 420 (5h Cir.1995) (quoting *Sawyer v. Butler*, 881 F.2d 1273,1286-87 (5th Cir.1989)).

The challenged remarks were made during the following questioning by the prosecutor:

> Q. Do you regard [the death penalty] as a deterrent to any type of crime?
>
> A. Well, it certainly prevents reoccurrence.
>
> Q. It substantially impairs the one executed; I agree. But as to other individuals?
>
> A. Yeah, in certain - in certain instances; I don't think it
> deters it all the time, because sometimes it's not a thinking process; but, certainly, where it is a premedi[t]ated process, I think it would certainly be a situation. If not, someone is not thinking ahead very far.
>
> Q. As you know, as you sit here now, if some other jury in this courthouse rendered a death verdict today - there are ... two or three other capital trials going on presently. You surely know it would take years and years and years before that sentence was ever carried out. *It would go through the Texas Court of Criminal Appeals and then the United States Supreme Court and then back through various State and Federal courts; and probably fifty judges will look at that thing before, ten years from today, they finally come down on one side or the other and say, "Yeah, you're going to*

execute him " or "No, You're not; retry him or something else. "

Does it bother you, as a juror, knowing that whatever decision you make is going to be like an annuity policy that one day is or is not going to happen?

A. I think it bothers me as a citizen; not necessarily as a juror.

Q. How does it bother you as a citizen?

A. I think that I think that the justice system is just all drawnout. If a few - granted, if you speeded up the process, a few innocent might die; but society, as a whole, might be better off.

Q. Did you sincerely believe what you just said: that even though a few not guilty might get burned in the process, we might be better off to go ahead and speed this thing up?

A. I think it's pretty fundamental to society. I think if you look back at history, you have people - you can trace it all the way back to the French Revolution, where, . certainly, many innocents were called, but perhaps the French people were better off.

(emphasis indicating challenged remarks).

The State argues that the challenged "comments were clearly designed to gauge whether a potential delay in the administration of the death penalty would affect O'Rourke's belief in the deterrent value of capital punishment, and were not meant to reduce O'Rourke's feelings of responsibility in assessing a sentence." This court has looked to the "context" of a prosecutor's remarks in determining a claim of *Caldwell* error. *See Stringer v. Jackson*, 862 F.2d 1108, 1111(5" Cir.1988), (opining that the petitioner had taken the prosecutor's comments out of context in that the prosecutor "was explaining to a juror that the law required that his questions be precise, not arguing that higher authorities substituted their discretion for that of the jury on the matter of punishment"), *vacated and remanded on other grounds*, 503 U. S. 222,112 S.Ct.1130 (1992). In the case at bar, O'Rourke, as previously indicated, was a highly educated prospective juror who engaged in some philosophical debate with the attorneys regarding the death penalty during voir dire. As such, the State's characterization of the context in which the remarks were made is fair. The district court agreed, finding this to be a "reasonable reading of the prosecutor's comments."

Moreover, the challenged remarks were made during voir dire, "greatly reducing the chance that they had any effect at all on sentencing." *Byrne v. Butler*, 845 F.2d 501, 508 (5th Cir.1988). Indeed, during closing argument at the sentencing phase, the prosecutor highlighted the jury's responsibility in determining whether Miniel received a sentence of death:

> thank heavens the *juries make these decisions*. It's not right that prosecutors make decisions that people ever die. You don't want Governments going out and saying, "This person should die, and

> this person should." Before anybody should get a death sentence, they should come to the juries, come to the people, and say, "Yeah, you have my permission before the Government ought to do anything."

(emphasis added). Similarly, defense counsel stated to the jury that after closing argument, "you'll be required to answer these two questions that will determine whether or not this boy dies or lives in confinement in a society where he will not, based upon the evidence beyond a reasonable doubt, be a continuing threat."[7]

In light of the context of the remarks by the prosecutor, the proper instructions given by the court at voir dire and sentencing, the closing arguments at the sentencing phase highlighting the jury's responsibility, and O'Rourke's obvious grasp of the sentencing scheme, the statements would not lessen a juror's sense of responsibility in determining the answers to the punishment issues.

In view of the deference afforded the trial court's credibility determination and the presumption accorded the state habeas court's factual finding under Section 2254(e)(1) with respect to the failure to excuse a juror for cause,[8] the federal habeas court was unpersuaded that Miniel rebutted the

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[7] Counsel also stated that "[n]ever, never, never, again, . . . will you have the power over the life of another human being, as you have now."

[8] We note that Miniel argues that the trial court abused its discretion in failing to excuse O'Rourke. The case Miniel cites for this proposition is a case on direct appeal to this Court. *See United States v. Hall*, 152 F.3d 381 (5th Cir.1998). As previously set forth, this federal habeas case is controlled by the standards set forth in AEDPA.

presumption with clear and convincing evidence. We perceive nothing in the district court's judgment which would give rise to a reasonable debate on this issue. Accordingly, we find that Miniel is not entitled to a COA with respect to this claim.

V. INEFFECTIVE ASSISTANCE OF COUNSEL.

Miniel next argues that trial counsel's failure to investigate and develop mitigating evidence amounted to constitutionally ineffective assistance requiring that his sentence be vacated. Under *Miller-El v. Cockrell*, *supra*, we must conduct a threshold inquiry into the merits of Miniel's claim to determine whether reasonable jurists would find the federal habeas court's resolution of this claim debatable or wrong.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), Miniel was required to prove that trial counsel's performance failed to meet generally accepted standards of competence and that there is a reasonable probability that the outcome of his case was affected by counsel's deficient performance. While the court in Strickland recognized that there is a broad range of professionally competent conduct in the trial of any case, generally accepted standards of competence require that counsel conduct an investigation regarding the accused's background and character. Williams v. Taylor, 529 U.S. 362,128 S.Ct.1495 (2000). Miniel contends that, had his trial counsel performed even the most rudimentary investigation, he would have found ample mitigating evidence to present during the penalty phase of his trial.[9]

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[9] See the Supreme Court's recent decision in *Wiggins v. Smith*, No. 02-311, 2003 WL 21467222 (2003), where the court emphasized that counsel had a duty under *Strickland* to make a reasonable investigation to uncover mitigating evidence.

During the penalty phase of Miniel's trial, the State presented five witnesses, four of whom testified regarding Miniel's past criminal history in Illinois. The fifth witness was a police officer from Humble, Texas who testified regarding Miniel's bad reputation in the community for violence. Miniel's trial counsel presented three witnesses.The first was a corrections officer who testified that Miniel had not presented any disciplinary problems during his incarceration. The second was a venireperson who had not been selected for Miniel's jury and who had visited Miniel several times in jail. The third was an assistant chaplain working at the jail who testified about Miniel's attendance at church services. None of Miniel's witnesses knew him before October 1998.

Miniel contends that trial counsel should have had him examined to determine whether he suffered from a mental or psychological disorder which would have provided an additional source of mitigation. In support of his state habeas petition, Miniel submitted a neuropsychological and psychological evaluation. Miniel was diagnosed as suffering from moderate impairment of his mental, cognitive, academic, social, and behavioral functioning. According to the evaluation, he has mild to moderate brain damage. Because of these disorders, Miniel has limited ability to use good judgment or reason in making his decisions and exhibits impulsive behaviors. However, nothing in the report or in any other document submitted by Miniel suggests that counsel was or should have been alerted to these problems.

Moreover, Miniel's trial counsel, Mr. Fred Heacock, explains in his affidavit that Miniel was tested by the State's psychologist and found to be competent to stand trial and found to have been competent at the time his crime was committed. He also states that Miniel was lucid and conversant during their meetings. Under these circumstances, there is nothing in the record to suggest that counsel should

have been alerted to a potential mental problem. We have held that counsel is not constitutionally ineffective for insufficiently investigating a defendant's mental or psychological condition when there is nothing to put counsel on notice that such a condition exists. *West v. Johnson*, 92 F.3d 1385, 1409, n. 46 (5th Cir.1996). Thus, the district court's resolution of the issue of whether counsel was ineffective for failing to investigate and present evidence of Miniel's mental condition is not debatable or wrong.

Miniel also contends that his deprived and abusive family history would have also provided a fertile source of mitigating evidence if his trial counsel had interviewed family members. In support of this contention in his state habeas proceeding, Miniel introduced the affidavits (Miniel's Affidavits) of several relatives and friends: Jesse Miniel (adoptive mother), Manuel Miniel (adoptive father), Maria Juana Miniel (adoptive sister), John Miniel (adoptive brother), Maria Secoro Leblanc (adoptive sister), Mary Margaret Miniel (adoptive sister), Carmen Cantu (biological mother), Sookie Leblanc (adoptive sister), David Hernandez (cousin), and Rosa Hunt (friend).

Miniel's Affidavits paint a picture of a rough childhood. Miniel's biological mother, Carmen Cantu, abandoned him when he was only a few days old. He was adopted by his aunt and uncle, Jesse and Manuel Miniel. He grew up in a house with six adoptive siblings in Rock Falls, Illinois, and his parents often fought over his father's drinking and philandering. They also fought over Manuel's treatment of Miniel. Manuel frequently beat Miniel from the time he was very young and some of these beatings were severe. In addition to the physical abuse, the children suffered from neglect. Jesse worked at a factory at night, leaving Manuel alone with the children. Manuel admits that he was an alcoholic and that he would often go to bars when Jesse was working. He would sometimes leave his children alone in the

car outside a bar for hours at a time, even during the harsh Illinois winters. Other times, he would leave them alone in the house.

Jesse, Manuel and Mary Margaret spent the month before Miniel's trial in Houston. They left right after the jury was selected, purportedly at Miniel's request. In their affidavits, both Manuel and Jesse state that, while in Houston, they tried to meet with Miniel's lawyer, Mr. Heacock, but he was always too busy to see them. Consequently, the only contact they had with Heacock while in Houston was a short meeting outside of the courtroom. Jesse notes that during this brief meeting Heacock simply reassured them that things were going smoothly. Jesse and Mary Margaret both note that Heacock never asked any questions about Miniel and never asked if they were willing to testify on his behalf. Similarly, Miniel's sister, Mary Juana, states that she called Heacock at least three times before the trial, left messages each time, but he never returned her calls. Mary Juana asserts that she wanted to help in any way she could and wanted to know how Miniel was doing.

In response, the State submitted the affidavit of Mr. Heacock. Heacock's statements conflict with Miniel's Affidavits. Heacock states that he told Jesse and Mary Margaret that someone should ask the jury to spare Miniel's life and that they refused to testify. Heacock states that Mary Margaret did not testify because she did not want to get involved. This testimony is in conflict with Mary Margaret's affidavit in which she states that she was never asked to testify. It also conflicts with Jesse's affidavit in which she states that she was never asked to testify. Heacock also claims that the family left after hearing part of the prosecution's case, but Jesse and Mary Margaret both assert that they left right after the jury was selected. Jesse claims they left because Miniel asked them to do so, while Heacock suggests that they left because they "had had enough" of the

trial. Heacock also denies that he refused to talk to Miniel's family. Manuel, Jesse, Mary Margaret and Mary Juana each claim that they made attempts to contact Heacock and that he was too busy to make time for them or failed to return their calls.

In denying Miniel's petition for habeas relief, the state habeas court credited Heacock's statements that he spoke to Miniel's family members who were present for part of his trial and that these family members did not want to get involved and that they did not appear to have warm feelings about Miniel. The state court also found that none of Miniel's family members indicated that they would have been available or willing to testify and that many had not been present at his trial. Based on these findings, the state habeas court concluded that Miniel failed to show that there were witnesses willing to testify or how that testimony would have benefitted his defense. Thus; the state habeas court ruled that Miniel failed to establish that counsel was ineffective under *Strickland*.

Miniel contends the federal district court erred in deferring to the state habeas court's findings because the state habeas judge (who was not the trial judge) made credibility calls to resolve conflicting affidavits.

We conclude that we need not consider this argument or any other arguments related to counsel's alleged deficient performance under *Strickland's* first prong. Even if the witnesses proffered by Miniel by affidavit had testified at trial about Miniel's abusive background, Miniel has not made a substantial showing that the jury would have answered the special issues any differently. Both the state habeas court and the federal district court determined that Miniel's ineffective assistance claim fails for a lack of prejudice. Based on our review, we conclude that jurists of reason could not debate the correctness of this determination.

During the punishment phase of Miniel's trial the State introduced evidence of numerous previous offenses committed by Miniel in Illinois, including aggravated battery from beating his girlfriend, another charge of aggravated battery, two unlawful use of weapons charges, a retail theft charge, and a charge of disorderly conduct. The State also presented evidence of Miniel's poor parole history and evidence that Miniel did not have a reputation as a peaceful and law abiding citizen. Also, the State produced evidence during the guilt phase that at the time of his arrest Miniel confronted the police with a shotgun and only dropped his weapon in response to his sister's pleas.

When we compare Miniel's violent history including the cruel manner in which he killed Manier with the potential testimony of his family members that centered on his childhood abuse and substance abuse, we are satisfied there is no reasonable probability that the jury would have answered the special issues in a different manner.[10] As the district court

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[10] Miniel's Affidavits are mild when compared to the evidence presented by the petitioners *in Wiggins v. Smith, supra*, and *Williams v. Taylor, supra*, in support of their ineffective assistance of counsel claims.

The petitioner in *Wiggins* presented evidence that he was beaten, starved and sexually abused from the time he was a small child. Wiggins' mother was a chronic alcoholic who often left him and his siblings alone at home for days at a time, forcing them to beg for food or to eat paint chips and garbage. *Wiggins*, slip op. at 4. Mrs. Wiggins kept her kitchen under lock and key and would beat the children when they broke into it for food to eat. *Id.* On one occasion, she pressed the petitioner's hand against a hot stove burner, leading to his hospitalization. *Id.* Wiggins' psycho-sexual abuse began when he was still in his mother's home. Mrs. Wiggins had sex with men while her children slept in the

same bed. *Id.* At the age of six, the petitioner was put in the foster care system where his physical abuse continued and sexual abuse began in earnest. He was physically abused by his first two foster mothers. *Id.* His second foster father repeatedly raped and molested him. *Id.* The petitioner ran away from his foster home and began living on the streets at the age of sixteen. *Id.* However, he eventually returned to foster care where he was again sexually abused. In one placement, his foster mother's sons allegedly gang raped him more than once. *Id.* After leaving the foster care system, the petitioner entered a Job Corps program. *Id.* There, he was again sexually abuse, this time by his supervisor- Id. Considering the nature and the extent of abuse, the Court found that there was a reasonable probability that a jury would have returned a different verdict. Id. at 23-24.

While Miniel was abused by his father, there is a paucity of evidence on the frequency or severity of the beatings. Also, there is no evidence of sexual abuse in his family or social history. He was not starved as a child, and Miniel was never shuffled in and out of foster homes.

The petitioner in *Williams v. Taylor, supra*, also offered considerably stronger evidence of abuse than Miniel. Williams presented evidence of physical abuse, mental retardation, and strong evidence that Williams did not pose a risk of future dangerousness as long as he was incarcerated. Williams presented evidence that his parents were imprisoned for the criminal neglect of him and his siblings. Id. at 395. Williams' juvenile records described a specific incident in which the children were taken from their parents' home and hospitalized. Id. at 395, n.19. Four of the children were drunk at the time of their removal. *Id.* The report describes Williams' parents' home as "a complete wreck," with human feces and urine standing in several places throughout the house and with trash and dirty dishes scattered in the kitchen. *Id.* These records also noted that all of the children were dirty, and none were wearing underpants. *Id.* Williams' parents were

concluded, "Miniel's past violent behavior would overwhelm any of the proposed mitigating evidence in determining future dangerousness... Miniel has failed to present `evidence of

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so intoxicated that they could not clothe the children so that they could be taken to the hospital. *Id.* There was also evidence that Williams had been severely and repeatedly beaten by his father. Id. at 395. After the children were removed from their parents' home, Williams spent two years in the foster care system, including one stretch in an abusive foster home. *Id.* The children were returned to their parents after their release from prison. *Id.* Williams was borderline mentally retarded and did not advance past the sixth grade in school. Id. at 396. Williams also presented evidence that he had been a model prisoner during a prior incarceration. Williams' prison records contained commendations for helping to break up a prison drug ring and for returning a prison guard's missing wallet. *Id.* Prison officials testified during his state habeas hearing that Williams was "among the inmates least likely to act in a violent, dangerous, or provocative way." *Id.* (Internal quotations omitted). A certified public accountant who frequently visited Williams as part of the prison ministry program testified that "Williams `seemed to thrive in a more regimented and structured environment.'" *Id.* This is consistent with the opinion of the State's trial expert that was revealed during Williams' state habeas proceeding that "if kept in a `structured environment,' [he] would not pose a future danger to society." Id. at 371.

The mitigating evidence proffered by Miniel is also mild by comparison to that presented by Williams. Miniel proffered no evidence tending to rebut the State's evidence that he posed a significant risk of future dangerousness. The nature and extent of the abuse Miniel experienced was far less severe than that described in *Williams*. Moreover, Miniel has not presented comparable evidence suggesting that retardation lessened his culpability.

sufficient quality and force to raise a reasonable probability that, had it been presented to the jury, a life sentence would have resulted.'" See *Andrews v. Collins*, 21 F.3d 612, 624 (5th Cir.1§94), *cert. denied* 513 U.S. 1114, (1995); *Miniel v. Cockrell*, No. H-00-4361, p.114 (S.D. Tex. filed November 13, 2001).

Based on the strength of the state's case, the state court determined that trial counsel did not render ineffective assistance in failing to present mitigating evidence because Miniel could not show prejudice. The federal habeas court concluded that the state court's determination of this issue is not contrary to or an unreasonable application of federal law. See 28 U.S.C. §2254(4)(1). We find nothing debatable or wrong with this conclusion.

VI. CONCLUSION.

For the reasons stated above we deny the petitioner's request for a COA on his claims that: (1) he was denied a jury instruction with respect to mitigating evidence and that he was precluded from introducing other mitigating evidence in violation of the Eighth Amendment; (2) he was denied his Sixth Amendment right to an impartial jury; and (3) he was denied his Sixth Amendment right to effective assistance of counsel.

COA denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20097

PETER J MINIEL

Petitioner - Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent - Appellee

Appeal from the Unified States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 7/17/03, 5 Cir., _____, _____F .3d _____)

Before JOLLY, DAVIS and CLEMENT, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be

polled on Rehearing En Banc (FED. R. APP. P. and 5th CTR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing Fin Banc as a Petition for Pane. Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

s/ W Eugene Davis
Unite States Circuit-Judge

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. 42833-01

EX PARTE PETER, J. MINIEL a/k/a PETER HENRANDEZ

ON APPLICATION FOR WRIT OF HABEAS CORPUS
FROM HARRIS COUNTY

The order was delivered per curiam

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On October 10, 1988, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuaut to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death.

Applicant's conviction was affirmed on direct appeal to this Court. Miniel v. State, 831 S.w.2d 310 (Tex. Crim. App.), *cert. denied,* 502 U.S. 885 (1992).

In the instant case, applicant presents thirty-one allegations in which he challenges the validity of his conviction and resulting sentence. The trial court enter findings of fact and conclusions of law, and recommended that the relief sought be denied.

This Court has reviewed the record. The trial court's findings of fact and conclusions of law are supported by the record. Upon such basis, the relief sought is denied.

IT IS SO ORDERED TIES THE 15TH DAY
OF DECEMBER, 1999.

PER CURIAM

En banc
Do Not Publish

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETER J. MINIEL,

Petitioner,

v. CIVIL ACTION NO. H-00-4361

JANIE COCKRELL,

Respondent.

MEMORANDUM AND ORDER

Petitioner, Peter J. Miniel ("Miniel"), pleaded not guilty to capital murder during the commission of a robbery in the 337th District Court of Harris County, Texas. A jury convicted Miniel on October 7, 1988, and,, based on the jury's answers to Texas' special issues, the trial court sentenced Miniel to death on October 17, 1988. On December 14, 2000, Miniel filed a Petition for Writ of Habeas Corpus in this court (Docket Entry No. 7). Pending before the court is the Motion of Respondent, Janie Cockrell (Cockrell), for Summary Judgment (Docket Entry No. 15). The court will grant Cockrell's motion and deny Miniel's petition for writ of habeas corpus.

I. Background

On May 8, 1986, Miniel and James Warren Russell, Jr., drove to Galveston from Houston. See State of Texas v. Peter J. Miniel, No. 450033, Trial Record vol. 25, p. 96 (337th Dist. Court, Harris County, Tex., October 5, 1988).

Miniel and Russell drove around Galveston drinking beer they purchased with a stolen credit card. See Trans. vol. 25, at p. 96. While driving by the seawall, they saw two men rolling a joint of marijuana. See Trans. vol. 25, at pp. 97-98. Miniel told the two men that he would buy gasoline and beer for them in exchange for marijuana. See Trans. vol. 25, at p. 98. The two men, Sammy Rogers and Chris Miln, told Miniel to follow them back to Houston to get some marijuana. See Trans. vol. 25, at pp. 99-100.

When the group arrived at an apartment in Houston, Peter Manier was just getting out of the shower. See Trans. vol. 25, at pp. 100-01. After a while Miniel, Miln, and Rogers left to find some marijuana and to take Miln home. See Trans. vol. 26, at p. 102. When Miniel, and Rogers returned from acquiring marijuana, they all sat around smoking joints and drinking beer. See Trans. vol. 25, at pp. 102--03. Rogers eventually passed out. See Trans. vol. 25, at p. 104. Miniel then told Russell that he thought Manier had money and that they should rob him. See Trans. vol. 25, "at p. "104. 'Miniel 'concocted a plan 'where Russell would - pretend to -- - procure some cocaine, distracting Manier so that they could render him unconscious. See Trans. vol. 25, at pp. 104-05. Russell went out to his car, pretending to retrieve cocaine. See Trans. vol. 25, at p. 105. When he returned, he found Miniel and Manier in Manier's bedroom. See Trans. vol. 25, at pp. 105-06. Russell saw Manier clean a small mirror to use in snorting cocaine. See Trans. vol. 25, at pp. 105-06. While Manier leaned over the mirror, Miniel struck him in the back of the head with a beer mug. See Trans. vol. 25, at p. 106. Manier fell to his knees, covering his head while Miniel continued to strike him. See Trans. vol. 25, at pp. 106-07. After Manier fell on his side, Russell hit him several times in the head with a shock absorber that had been sitting on a table. See Trans. vol. 25, at pp. 106-07. Miniel told Russell that he was not hitting him hard enough and then used the shock absorber himself. See Trans. vol. 25,

at pp. 107-08. When Miniel found that he could not knock out Manier, he told Russell to stab him with a small knife. See Trans. vol. 25, at p. 108. Russell was unable to carry through with this order, and Miniel himself stabbed Manier numerous times. See Trans. vol. 25, at pp. 108-09. Russell then held Manier while Miniel attempted to slit his throat. See Trans. vol. 25, at p. 109. Finally, Miniel attempted to asphyxiate him by shoving a blanket down his throat. See Trans. vol. 25, at pp. 109-10.

Miniel took Manier's s wallet and became angry when he discovered that they killed a man for only twenty dollars. See Trans. vol. 26, at pp. 249, 315. They then searched the apartment for drugs or money. See Trans. vol. 26, at pp. 249-50. Miniel and Russell left the apartment, stealing Manier's stereo equipment. See Trans. vol. 25, at pp. 110-14. They washed off Manier's blood and hid the knife. See Trans. vol. 25, at pp. 114-15. Miniel and Russell then went to Burger King to eat hamburgers. See Trans. vol. 25, at pp. 116-17.

Miniel was eventually arrested at his sister's apartment in Chicago, Illinois. The police recovered some of Manier's stereo equipment from another individual in the apartment building. At a Chicago police department substation, Miniel made an oral statement confessing to Manier's murder.

Miniel's trial began before the 337th District Court of Harris County on October 5, 1988.[1] Miniel pleaded not guilty. See Trans. vol. 25, at p. 15. Miniel did not call any defense witnesses in the guilt/innocence phase. On October 10, 1988, the jury found Miniel guilty of capital murder. See Trans. vol. 27, at pp. 511-12.

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[1] Fred M. Heacock and Al Thomas represented Miniel at trial. For the most part, the court will refer to the attorneys conjunctively as "trial counsel."

During the punishment phase of Miniel's trial, the State reintroduced all the evidence from the guilt/innocence phase. See Trans. vol. 28, at p. 12. The State also introduced evidence of Miniel's many prior offenses in Illinois. The State introduced evidence of Miniel's s guilty plea to a charge of aggravated battery from beating his girlfriend with a wooden spoon and a motorcycle chain. See Trans. vol. 28, at pp. 35, 59. The State also introduced another previous charge of aggravated battery where Miniel beat someone with numchucks. See Trans. vol. 28, at pp. 4243. Other offenses adduced by the State included two unlawful-use-of-weapons charges, see Trans. vol. 28, at pp. 37-38; a retail theft charge, see Trans. vol. 28, at p. 47; and a charge of disorderly conduct, see Trans. vol. 28, at p. 48. The State also presented evidence of Miniel's poor parole history. See Trans. vol. 28, at pp. 37-38, 48-49. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person. See Trans. vol. 28, at pp. 45, 63, 71.

Miniel called three witnesses in the punishment phase. Darryl Hendrichson, a Harris County Sheriff's Department employee in the Harris County jail, testified about Miniel's behavior while incarcerated. See Trans. vol. 28, at pp. 78-79. Hendrichson testified that Miniel had never presented a disciplinary problem during his incarceration before trial. See Trans. vol. 28, at p. 80.

Carol Ruth Weed, a prospective juror in Miniel's case, also testified in his behalf. After she was dismissed from jury service, Weed felt that she had made a connection with Miniel . See Trans. vol. 28, at p. 90. Weed visited him in jail every week while he awaited trial. See Trans. Vol. 28, at p. 87. They spoke mostly about religion and she opined that Miniel's religious inclination was genuine, not "foxhole religion." See Trans. vol. 28, at pp. 87-88.

Finally, the defense called Juan Cortez, an assistant Harris County chaplain. See Trans. vol. 28, at pp. 96-97. Cortez testified that Miniel attended church service almost every week while incarcerated. See Trans. vol. 28, at pp. 98-99. Cortez. testified that Miniel's religious devotion seemed sincere. See Trans. vol. 28, at pp. 100-01. Cortez testified that those in society who accept their guilt and seek to be an instrument for good in society should be given a second chance. See Trans. vol. 28, at p. 102.

The jury retired to consider the special issues on October 11, 1988.[2] On October 12, 1988, the jury returned affirmative answers to the special issues, see Trans. vol. 28, at pp. 159-60, and the trial court sentenced Miniel to death. See Trans. vol. 28, at pp. 162-63.

Miniel appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed on January 22, 1992. See Miniel v. State, 831 S.W.2d 310 (Tex. Crim.

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[2] The special issues were as follows:

Special Issue No. 1

Was the conduct of the defendant, Peter J. Miniel, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, Peter J. Miniel, would commit criminal acts of violence that would constitute a continuing threat to society?

Trans. vol. I-A, at pp. 338-39.

App. 1992).[3] Miniel sought a rehearing, which the court denied on April 15, 1992. Miniel then filed a petition for writ of certiorari in the Supreme Court of the United States, which was denied on October 5, 1992. See Miniel v. Texas, 506 U.S. 885 (1992).

Miniel filed an application for writ of habeas corpus in state court on June 15, 1993. On November 8, 1996, Miniel filed an amended application. The State did not respond to Miniel's application until March 9, 1999. The state habeas court did not hold an evidentiary hearing on Miniel's claims. On July 28, 1999, the state habeas court entered detailed findings of facts and conclusions of law recommending that relief be denied. See Ex parte Miniel, No. 450033-A, Findings of Fact, Conclusions of Law and Order (337th Dist. Ct., Harris County, Tex., July 28, 1999). The Court of Criminal Appeals denied relief on December 15, 1999. See Ex parte Miniel, No. 42,833-01 (Tex. Crim. App. Dec. 15, 1999).

Miniel filed a petition for writ of habeas corpus in this court on December 14, 2000. See Petition for Writ of Habeas Corpus (Docket Entry No. 7). Miniel alleges that:

1) his trial counsel rendered ineffective assistance in violation of the Sixth Amendment because

   (a) they failed to investigate and develop mitigating circumstances relevant to his life, specifically his family background and social, medical, and mental history (pp. 4-14, 19-30);

   (b) they made mistakes in jury selection and voir dire examination of prospective jurors (pp. 30-41);

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[3] Robert Rodriguez represented Miniel on direct appeal.

(c) they failed to object to the State's suggestion that the law of the parties applied to the punishment phase of trial (pp. 42-48) ;

(d) they entered into an agreement not to cross-examine an important witness (pp. 48-51);

(e) they failed to correct legal mischaracterizations by the State (p. 51) ;

(f) they confessed Miniel's guilt in closing arguments (pp. 51-55) ;

(g) they emphasized the graphic nature of the crime (pp. 55-56) ;

(h) they failed to object to the introduction of prejudicial evidence (pp. 56-57) ;

(i) they failed to effectively cross-examine witnesses (p. 57);

(j) they failed to offer any evidence to support the theory that Miniel's conviction was involuntary (pp. 57-58) ;

(k) they failed to adequately plead for his life during closing arguments (p. 58) ;

(2) the State presented false testimony at trial (pp. 59-64) ;

(3) the trial court failed to preserve his Sixth Amendment rights by not inquiring into his dissatisfaction with trial counsel's representation (pp : 65 -68) ;

(4) Texas' system for appointing capital counsel violated the Sixth Amendment guarantee of effective representation (pp. 69-74) ;

(5) trial counsel's alleged agreement not to cross-examine a prosecutorial witness violated Miniel's s right to confront witnesses against him (pp. 75-77) ;

(6) the State engaged in a pattern of misconduct (pp. 78-82) ;

(7) the trial court erroneously refused to excuse venireperson Patrick O'Rourke (pp. 83-90) ;

(8) the trial court erred in excusing venireperson Kathy Hernandez for cause (pp. 91-97) ;

(9) the trial court erroneously refused to excuse venirepersons Frederick Jones, Joseph Foster, Jr., and Dorothy Campbell for cause (pp. 98-106) ;

(10) the State misled the jury into believing that the law of the parties applied at the sentencing phase of trial (pp. 107-14) ;

(11) the trial court erroneously failed to instruct the jury that the law of the parties did not apply at the punishment phase (pp. 115-16) ;

(12) the trial court's failure to instruct the jury on the vague special issues violated the Constitution (pp. 117130) ;

(13) the jury instructions misled the jury concerning the effect of a "no" vote by a single juror (pp. 131-33) ;

(14) the admission of Miniel's s coerced confession violated the Fifth and Fourteenth Amendments (pp. 134-38) ;

(15) the trial court violated his right to a speedy trial by delaying his trial (pp. 139-41) ;

(16) the special issues precluded the presentation and consideration of mitigating evidence (pp. 142-48) ;

(17) the trial court unconstitutionally refused to give his requested instruction on mitigation (pp. 149-50) ;

(18) the trial court violated his due process rights by failing to require the jury to consider prior unadjudicated offenses only if proved beyond a reasonable doubt (pp. 151-54) ;

(19) the trial court violated the equal protection clause by allowing the State to admit unadjudicated offenses in the punishment phase (pp. 155-58) ;

(20) the trial court violated the Constitution by failing to instruct the jury about Texas' parole law (pp. 159-63) ;

(21) the special issues unconstitutionally required the jury to consider whether there was a "probability" that Miniel would commit future violent acts (pp. 164-65) ;

(22) the Texas rule requiring the expenditure of peremptory challenges to preserve voir dire error violated the equal protection clause (pp. 166-67) ;

(23) the Texas capital sentencing statute unconstitutionally violated his right to have the jury determine his fate (pp. 168-69) ; and

(24) his appellate counsel rendered ineffective assistance by

(a) failing to raise voir dire errors on direct appeal (pp. 170-71) ;

(b) failing to raise issues relating to Miniel's dissatisfaction with trial counsel (p. 171); and

(c) failing to raise a speedy trial claim (p. 171).

See Petition for Writ of Habeas Corpus (pages indicated) (Docket Entry No. 7).

Cockrell argues, that she is entitled to summary judgment on Miniel's claims. Cockrell contends that several of Miniel's claims are barred under the procedural default doctrine. Cockrell also argues that, under the standard of review applicable to state court determinations on habeas review, the federal court should not grant habeas relief. Additionally, Cockrell argues that Miniel's s claims are meritless.

II. Standard of Review

Because Miniel filed his federal petition for writ of habeas corpus on December 14, 2000, it is subject to review under 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective DeathPenalty Act of 1996 ("AEDPA") , Pub. L. No. 104-132, 110 Stat. 1214. See Nobles v. Johnson, 127 F.3d 409, 415 (5th Cir. 1997), cert. denied, 523 U.S. 1139 (1998). Under the AEDPA, a court cannot grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West Supp. 1999). Under the AEDPA, federal review of a state court determination differs depending on whether the issue is one of law, one of fact, or a mixed question of law and fact. See Williams v. Cain, 229 F.3d 468, 474 (5th Cir. 2000), cert. denied, ___S. Ct. ___ (2001).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this court may grant federal habeas relief under 28 U.S.C. 2254 (d) (1)only if the state court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. See Martin v. Cain, 246 F.3d 471, 475 (5th Cir.), cert. denied, ___ S. Ct. ___(2001). A state court decision will be contrary to the Supreme Court's clearly

established precedent "if the state court either `applies a rule that contradicts the governing law set forth in (the Supreme Court],' or `confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent. I" Penry v. Johnson, ___ U.S. ___ , 121 S. Ct. 1910, 1918 (2001) (quoting Terry Williams v. Taylor, 529 U.S. 362, 406 (2000)).[4]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." Terry Williams, 529 U.S. at 406."In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." Hoover v. Johnson, 193 F.3d 366, 368 (5th Cir. 1.99-9). " [E] ven if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is, also objectively unreasonable." Penry, 121 S. Ct. at 1918; see also Gardner v. Johnson, 247 F.3d 551, 560 (5th Cir. 2001) (stating that the AEDPA mandates relief in the case of a state court decision "that is not merely wrong but is so wrong that it is 'unreasonable'").

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[4] On April 18, 2000, the Supreme Court issued two separate opinions involving the AEDPA, both originating in Virginia, in which the petitioners had the same surname. Terry Williams v. Taylor, 529 U.S. 362 (2000), involves § 2254(d) (1) and Michael Williams v. Taylor, 529 U.S. 420 (2000), involves S 2254 (e) (2) . To avoid confusion, this court will include the full name of the petitioner when citing these two cases.

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. 2254(d)(2). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e) (1).

III. Procedural Bar

Cockrell argues that several of Miniel's claims are procedurally barred.. "[A] federal court may not consider a state prisoner's federal habeas claim when the state court based its rejection of that claim on an adequate and independent state ground." Martin v. Maxey, 98 F.3d 844, 846 (5th Cir. 1996) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). The Supreme Court has held that

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.[5] "This doctrine ensures that federal courts give proper respect to state procedural rules." Glover v.

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[5] To demonstrate a fundamental miscarriage of justice in this context, the petitioner must show that he is actually innocent of the crime of which he was convicted. See Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992). Miniel makes no

Cain, 128 F.3d 900, 902 (5th Cir. 1997) (citing Coleman, 501 U.S. at 750-51), cert. denied, 523 U.S. 1125 (1998) ; see also Edwards v. Carpenter, 529 U.S. 446, 450 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

A claim may also be procedurally barred if it has not been reviewed by the state courts. See Horsely v. Johnson, 197 F.3d 134, 137 (5th Cir. 1999). "A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred;'" Nobles, 127 F.3d at 420 (quoting Coleman, 501 U.S. at 734 n.1).[6] Texas courts considering unexhausted claims on a successive habeas petition would find them procedurally defaulted. Article 11.071 § 5(a) of the Texas Code of Criminal Procedure prohibits a Texas court from considering a successive habeas petition on the merits unless the petition satisfies one of the narrowly-defined exceptions. The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that the rule is strictly and regularly enforced. See Barrientes v. Johnson, 221 F.3d 741, 759 (5th Cir. 2000), cert. dismissed, 121 S. Ct. 902 (2001) ; Muniz v.

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attempt to show that he was actually innocent of Manier's murder.

[6] "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b) (2). This court, however, cannot grant relief under the AEDPA if a petitioner has failed to exhaust the available state court remedies. See 28 U.S.C.§ 2254 (b) (1) (A) .

Johnson, 132 F.3d 214, 221 (5th Cir.) , cert. denied, 523 U.S. 1113 (1998).

The court will consider Cockrell's procedural default defense as the court addresses each claim.

IV. Analysis

A. Russell's Testimony

In his second claim for relief Miniel alleges that the State presented false evidence at trial and suppressed exculpatory evidence from him.[7] Miniel bases this claim on Russell's trial testimony. Specifically, Miniel points to Russell's testimony concerning their plan to steal from Manier. See Trans. vol. 25, at pp. 104-05. The State used Russell's testimony to demonstrate that Miniel killed Manier in the course of a robbery.[8]

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within those cases in which a defendant must show "specific prejudice to his defense." Doggett, 505 U.S. at 656.

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[7] The operative facts underlying Miniel's first claim for relief, that trial counsel rendered ineffective assistance of counsel, echo those raised as substantive constitutional violations. For the sake of economy, the court will address the substantive claims first, and will then address Miniel's ineffective assistance claims.

[8] In virtually every claim, Miniel argues that his claims arise under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The (continued...)

Miniel fails to demonstrate "actual prejudice in his ability to prepare and present his defense." Id. Miniel has not shown that any witnesses died or disappeared during the wait. Miniel only argues that "fading memories" impaired his ability to crossexamine witnesses. Miniel offers no concrete evidence of impaired recollection. Nor does Miniel point to any testimony tainted by the passage of time. Miniel has failed to show "actual prejudice" resulting from the delay. This factor weighs strongly and decisively in the Cockrell's favor.

5. Conclusion of speedy-trial claim

Weighing the factors involved in the trial delay, Miniel has not shown a violation of the Sixth Amendment. While the trial delay spanned over two years and Miniel promptly complained of the postponement, the delay was not attributable to the prosecution. Furthermore, Miniel has completely failed to show actual prejudice. The state court's rejection of his speedy trial claim was not objectively unreasonable. Because Miniel has failed to demonstrate that the state court decision was contrary to, or an unreasonable application of, federal law, his fifteenth claim is denied. See 28 U.S.C. § 2254(d)(1).

N. Mitigating Evidence

Miniel raises two claims involving the presentation of mitigating evidence at trial Miniel's sixteenth claim is that Texas' special issues precluded the presentation and consideration of mitigating evidence. In his seventeenth claim, Miniel contends that the trial court violated his constitutional rights when it failed to give his proposed jury instruction on mitigation. Miniel's claims are based on Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I").

In Penry I the Supreme Court held that, in some cases under the then-applicable scheme, Texas did not permit a jury to give effect to mitigating evidence introduced by a defendant. The defendant in Penry I offered extensive evidence of his mental retardation and abused childhood as mitigating factors. The Penry I Court found that those factors may have been relevant to the special issues, but also "'had relevance to [his] moral culpability beyond the scope of the special verdict question [n] .1 " Penry I, 492 U.S. at 323 (quoting Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (0' Connor J., concurring)) . The special issues were not broad enough to give effect to Penry' s mitigating evidence. In Penry I the Supreme Court held that

> when a capital defendant introduced evidence about his background, character, or circumstances that reflects a reduced personal culpability, and the jury cannot give effect to the mitigating force of that evidence in response to Texas' special issues, the trial court must provide instructions that allow the jury to consider and give mitigating effect to that evidence.

Davis, 51 F . 3 d at 460. The Penry I Court mandated that, in such circumstances, the jury must be instructed "that it could consider and give effect to the mitigating evidence" by declining to impose the death penalty. Id. at 322-25. The absence of such an instruction violated the Constitution.

In the punishment phase of trial Miniel called three witness, each of whom testified that he would not pose a future danger to society if incarcerated. These witnesses focused on his good behavior and religious devotion while incarcerated. Miniel requested that the trial court deliver a jury instruction concerning the consideration of mitigating evidence. The trial court refused his request.

1. Mitigating circumstances

Miniel argues that the language of the special issues prevented the jury from considering important mitigating evidence. Miniel specifically argues that the jury could not consider the following evidence:

- emotional trauma from his adoption;
- his alcoholic father;
- his history of severe abuse as a child;
- his history of substance abuse;
- the history of suicide attempts and substance abuse by members of his family; and
- evidence of mental and social impairment,

See Petition for Writ of Habeas Corpus pp. 143-44 (Docket Entry No. 7).

"A petitioner cannot base a Penry claim on evidence that could have been but was not proffered at trial." Boyd v. Johnson, 167 F.3d 907, 912 (5th Cir.), cert. denied, 527 U.S. 1055 (1999) ; see also West v. Johnson, 92 F. 3d 1385, 1405 (5th Cir. 1996), cert. denied, 520 U.S. 1242 (1997); Crank v. Collins, 19 F.3d 172, 176 (5th Cir.) , cert. denied, 512 U.S. 1214 (1994) . The Fifth Circuit has "made it clear that any Penry claim will be procedurally barred if the mitigating evidence is not actually proffered at trial." Mann v. Scott, 41 F.3d 968, 979 (5th Cir. 1994), cert. denied, 514 U.S. 1117 (1995). Miniel failed to present the evidence he contends was precluded under the Special Issues. He fails to raise a valid Penry claim on this basis. The state habeas court concluded that Penry I "requires the introduction of mitigating evidence before a jury, not allegations of mitigating evidence presented

years later . . . ." Ex parte Miniel, No. 450033-A, at p. 1190, 1 29. This determination is not contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d) (1).[28]

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[28] Miniel seems to suggest that the nature of the special issues influenced trial counsel into not presenting the mitigating evidence. There is no indication that trial counsel refused to present this information due to the nature of the special issues. Furthermore, the Fifth Circuit "has consistently rejected the related argument that the Texas statutory capital sentencing scheme is invalid as preventing or chilling defense counsel's development of mitigating evidence." Briddle v. Scott, 63 F.3d 364, 377-78 (5th Cir.) , cert. denied, 516 U. S. 1033 (1995) . Trial counsel's decision to not present that mitigating evidence will be addressed in Miniel's ineffective assistance of counsel claim.

2. Mitigation instructions

During the punishment phase, Miniel asked the trial court to instruct the jury concerning the presentation of mitigating evidence pursuant to Penry I. The Fifth Circuit has limited the application of Penry I to those cases in which the mitigation evidence had relevance beyond the scope of the special issues. Penry I held "that 'a jury [must] be able to consider in some manner all of a defendant's relevant mitigating evidence,, not that % a jury [must] be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.'" Motley, 18 F.3d at 1234 (quoting Johnson, 509 U.S. at 372). "[A] Penry claim does not arise when constitutionally relevant evidence `can be given mitigating effect in some way under the Texas special issues.'" Davis, 51 F . 3d at 464 (quoting Motley, 18 F . 3d at 1234). The Fifth Circuit employs a two-step procedure to determine whether the mitigating evidence requires relief under Penry I: the court "must determine (1) that the proffered evidence was constitutionally relevant mitigating evidence, and, if so, (2) that the - proffered evidence was beyond the - effective reach of the Jurors. Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (citing Johnson, 509 U.S. at 366), cert. denied. 513 U.S. 1156 (1995).[29]

A federal court's first inquiry in a Penry claim is whether the mitigating evidence was "constitutionally relevant mitigating evidence." See Vuong v. Scott, 62 F.3d

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[29] The Supreme Court recently revisited its Penry I decision. In Penry II the Court held that a mitigation instruction commonly used by the Texas courts did not allow for the consideration of mitigating evidence. See Penry II, 121 S. Ct. at 1922. The Penry II decision does not seem to change the jurisprudence flowing from Penry I; instead, Penry II merely clarified Penry I's application to that specific mitigating instruction.

673, 680 (5th Cir.), cert. denied, 516 U.S. 1005 (1995); Davis, 51 F.3d at 461. The Fifth Circuit has narrowly defined "constitutionally relevant mitigating evidence." The Fifth Circuit has characterized the relevancy inquiry as asking "does the evidence implicate the basic concern of Penry 'that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Madden, 18 F.3d at 307 (quoting Penry I, 492 U.S. at 319). "In order to present relevant evidence that one is less culpable for his crime, the evidence must show (1) a uniquely severe permanent handicap with which the defendant is burdened through no fault of his own, . . . (2) and that the criminal act was attributable to this severe permanent condition." Davis, 51 F . 3 d at 460. In evaluating whether a defendant suffers from a uniquely severe handicap, the Fifth Circuit has limited Penry I to the precise facts of that case. The Fifth Circuit seems to recognize a Penry claim based only on the discrete mitigating evidence in that case, *i.e.,* severe mental retardation and extreme childhood abuse.

In addition to bearing a similarity to the evidence in Penry I, the Fifth Circuit has required that the criminal act must have been related to the unique handicap. To warrant federal relief, a Penry claim must exhibit a "nexus" between the mitigating evidence and the criminal act. See Harris v. Johnson, 81 F. 3d 535, 539 (5th Cir. 1996), cert. denied, 517 U.S. 1227 (1997); Turner v. Johnson, 106 F.3d 1178, 1189 (5th Cir. 1997). The nexus requirement finds its basis in the language of Penry I. In Penry I the Supreme Court found that the failure to consider Penry's mitigation evidence violated the Constitution because his criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems . . . ." 492 U.S. at 304 (emphasis added) . The Fifth Circuit has interpreted this language to require a "clear nexus between [the petitioner's] handicap and his criminal act . . . ." Madden, 18 F.3d at 307; see also Jones,

171 F.3d at 276; Boyd, 167 F.3d at 912; Turner, 106 F.3d at 1189; Harris, 81 F.3d at 539; Russell v. Collins, 998 F.2d 1287, 1292 (5th Cir. 1993), cert. denied, 510 U.S. 1185 (1994). The nexus need not be precise; "at a minimum the evidence must permit a rational jury to `infer that the crime is attributable' at least in part, to the defendant's background" Russell; 998 F, 2d at 1292 (citing Graham v. Collins, 950 F.2d 1009, 1033 (5th Cir. 1992)).

If mitigation evidence is relevant, the court must determine whether the evidence was beyond the effective reach of the jurors. A jury must be able to "consider in some manner [the petitioner's] relevant mitigating evidence" under Texas' sentencing scheme. Motley, 18 F.3d at 1235. The Fifth Circuit has stated that

> a "fair reading" of Penry, as it remains the law, was that the Texas special issues place a defendant's mitigating evidence beyond jurors' effective reach when that evidence can be given only aggravating effect. That is, as long as a defendant's evidence can be given mitigating effect in some way under the Texas special issues, no additional instruction would be constitutionally required.

Id. at 1234 (citing Johnson, 509 U.S. at 371). For federal habeas relief to be available, there must be a reasonable likelihood that the jury applied the Texas special issues in a way that prevented consideration of the constitutionally relevant mitigating evidence. See Lackey v. Scott, 28 F.3d 486, 489 (5th Cir. 1994), cert. denied, 513 U.S. 1086 (1995). The State can "structure" the jury's consideration of mitigating evidence, provided it does not prevent the jury from giving effect to any constitutionally relevant mitigating evidence. See Buchanan v. Angelone, 522 U.S. 269, 276 (1998); Johnson, 509 U.S. at 362; Boyde v. California, 494 U.S. 370, 377 (1990).

The court will analayze the extent to which Smith's proffered evidence constitutes "Penry-type evidence" beyond the scope of the special issues.

a. Intoxication

Miniel argues that the jury could not consider his intoxication and drug use on the night of the murder in the context of the special issues. The Fifth Circuit has held that "selfinflicted chronic drug and alcohol abuse and the resulting arrested emotional development do not constitute a unique handicap with which the defendant was burdened through no fault of his own.'" Tucker v. Johnson, 115 F.3d 276, 282 (5th Cir.), cert. denied. 522 U.S. 1017 (1997). Voluntary intoxication does not constitute a "uniquely severe permanent handicap." See Drew v. Collins, 964 F.2d 411, 421 (5th Cir. 1992), cert. denied, 509 U.S. 925 (1993). The Fifth Circuit has repeatedly held that such factors may be considered within the scope of Texas' special issues. See West, 92 F.3d at 1405; Briddle v. Scott, 63 F.3d 364, 377 (5th Cir.), cert. denied. 516 U.S. 1033 (1995) ; East v. Scott, 55 F.3d 996, 1007 (5th Cir. 1995); Lackey 28 F.3d at 489; Nethery , 993 F.2d at 1161; James, 987 F.2d at 1121-22; Drew, 964 F.2d at 420-21; Bridge v. Collins, 963 F.2d 767, 769-70 (5th Cir. 1992) , cert. denied., 509 U.S. 925 (1993); Barnard v. Collins, 958 F.2d 634, 638-39, (5th Cir. 1992) , cert. denied, 506 U. S . 1057 (1993) ; Cordova v. Collins, 953 F.2d 167, 170 (5th Cir.), cert. denied, 502 U.S. 1067 (1992) . Miniel's evidence of drug abuse and intoxication was not Penry evidence that could not have been considered by the jury in the context of the special issues. The state habeas court's denial of this claim was not contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254 (d) (1) .

b. Good behavior and religiosity

At the punishment phase, Miniel also presented evidence of his good behavior while incarcerated and his religious devotion. The Fifth Circuit has held that such evidence may be considered within the context of the special issues. See Turner, 106 F.3d at 1189; Nichols, 69 F.3d at 1267-68; James, 987 F.2d at 1121-22; Jernigan v. Collins, 980 F.2d 292, 295 (5th Cir. 1992), cert. denied, 508 U.S. 978 (1993); Holland v. Collins, 962 F.2d 417, 419-20 (5th Cir. 1992), c denied, 509 U.S. 925 (1993) ; Barnard, 958 F.2d at 638-39; Graham v. Collins, 950 F.2d 1009, 1032-33 (5th Cir, 1992), aff'd, 506 U.S. 461 (1993). The Supreme Court has expressly held that evidence of positive character traits has "mitigating relevance to the second special issue concerning his likely future dangerousness." Graham, 506 U.S. at 475. The state court's rejection of this claim was not contrary to, or an unreasonable application of , federal law. See 28 U. S. C. § 2254 (d) (1). Miniel' s mitigation evidence claims are denied.

0. Unadjudicated Offenses

In issues eighteen and nineteen, Miniel argues that the trial court erred in allowing the introduction of prior unadjudicated offenses in the punishment phase. Miniel argues that the equal protection clause prevents the introduction of unadjudicated offenses because such evidence is not allowed in non-capital trials. Miniel also argues that due process requires that the jury be instructed that unadjudicated offenses must be proven beyond a reasonable doubt.

Miniel failed to lodge objections to the unadjudicated offenses at trial. The state habeas court held that these claims

cert. denied, 513 U.S. 830 (1994). "Under the Texas death penalty statute in effect at the time of [Miniel' s] conviction, the jury answers the special issues 'yes' or 'no' and then the trial court imposes the punishment that follows from those answers . . . ." Montoya v. Scott, 65 F.3d 405, 421(5th Cir. 1995), cert. denied, 517 U.S. 1133 (1996); see also TEX. CODE CRIM. Proc. art. 37. 071 (e) .

At jury selection, the State informed the jury that the trial court would impose a death sentence if they answered the special issues in the affirmative. At the punishment phase, both parties told the jury that "yes" answers would result in a death sentence. The trial court informed the jury that affirmative answers to the special issues would result in a death sentence. See Trans. vol. I-A, at p. 335. There was no suggestion that the jury should not act within its responsibilities under Texas statutory law. Nothing in this case detracted from the jury's ability to recognize "the gravity of its task and [to] proceed[] with the appropriate awareness of its 'truly awesome responsibility.'" Lowenfield, 484 U.S. at 258 (quoting Caldwell, 472 U.S. at 341). Accordingly, the state court determination was not contrary to, or an unreasonable application of, federal law.See 28 U.S.C. § 2254(d)(1).

T. Ineffective Assistance of Trial Counsel

In his first claim for relief, Miniel challenges his trial counsel's performance on several grounds. Under the test announced in Strickland v. Washington, a defendant asserting ineffective assistance of counsel must prove that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. 466 U.S. at 687. If the petitioner makes an insufficient showing on one prong of the test, the court need not address the other. See id. at 697. In order to prevail a defendant must overcome a strong presumption that counsel rendered adequate assistance and

made decisions in the exercise of reasonable professional judgment. See id. at 690-91. It is not enough that petitioner allege a deficiency on the part of trial counsel. Instead, he must affirmatively prove prejudice, id. at 692, and demonstrate ineffectiveness by a preponderance of the evidence. See Jerniagan, 980 F.2d at 296. The court will discuss each of Miniel's ineffective assistance claims under this standard.

1. Previously-addressed claims

The court has already addressed the underlying basis for several of Miniel's ineffective assistance claims. The court has already rejected the substantive claim that: (1) Mr. O'Rourke should have been dismissed for cause; (2) the State's law of the parties argument prejudiced him in the punishment phase; (3) Miniel's Sixth Amendment rights were violated by the cross-examination of Russell; and (4) the State's legal mischaracterizations violated his constitutional rights. The Court has also addressed trial counsel's action in the context of the procedural bar analysis. For the reasons already provided, Miniel's ineffective assistance claims based on those arguments are also without merit. The state habeas court's rejection of those ineffectiveness claims was not contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1).

2. Failure to investigate and present mitigating evidence

Miniel contends that trial counsel failed to investigate and present viable mitigating evidence at the punishment phase of trial. To protect against arbitrary and capricious imposition of the death penalty, a capital punishment sentencing scheme must allow the sentencing authority to consider any mitigating circumstances. See Jurek, 428 U.S. at 271 (stating that "in order to meet the requirement of the

Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances"). A defense counsel's failure to investigate and present mitigating evidence can amount to ineffective assistance. See Terry Williams, 529 U.S. at 390; Lockett v. Anderson, 230 F.3d 695, 711 (5th Cir. 2000).

The Supreme Court has said that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In evaluating an ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. "Notwithstanding the constitutional stature of appropriate mitigating evidence in a capital case, counsel's failure to develop or present mitigating background evidence is not per se deficient performance." Moore v. Johnson, 194 F. 3d 586, 614 (5th Cir. 1999); see also West, 92 F. 3d at 1408 ("The failure to present a case in mitigation during the sentencing phase of a capital murder trial is not, per se, ineffective assistance of counsel."). The Fifth Circuit has held that the "failure to present mitigating evidence if based on an informed and reasoned practical judgment, is well within the range of practical choices not to be second-guessed." Wilkerson v. Collins, 950 F.2d 1054, 1065 (5th Cir. 1992), cert. denied, 509 U.S. 921 (1993) ; see also Moore, 194 F. 3d at 614; McCoy v. Lynaugh, 874 F.2d 954, 964 (5th Cir. 1989) (finding that counsel's decision not to present mitigating evidence is entitled to deference when based upon informed and reasoned practical judgment).

In support of his claim that trial counsel failed to uncover mitigating evidence, Miniel provides the affidavits of

several family members.[32] These affidavits chronicle Miniel' s home life. Miniel was the illegitimate child of Carmen Canto, who allowed her sister's family to adopt him shortly after birth. Until age ten, Miniel thought that he was born into his adoptive family. When he found out that he had been adopted, the other family members taunted him, and his behavior changed for the worse. The affidavits speak of Miniel's adoptive father as a violent alcoholic, who severely beat his children, especially Miniel.

Miniel apparently had a stormy home life, in constant contention with his adoptive parents and siblings. Miniel began abusing drugs and alcohol at a very young age. The affidavits note that Miniel had been involved in motor vehicle accidents that profoundly affected him. The affidavits also chronicle a history of suicidal behavior by the Miniel family. Each of Miniel' s family members state that trial counsel only spoke with them briefly. They state that counsel never talked with them about testifying or asked them any questions about Miniel.

Miniel also complains that trial counsel failed to obtain psychological testing in order to acquire mitigating evidence. In a "neurological and psychological evaluation" prepared for the state habeas proceedings, there is a finding that Miniel suffers from "mild to moderate neuropsychological brain impairment with significant dysfunction in the frontal lobes," -(Docket Entry . No. 7, Exhibit 28 at p. 10, Neurological and Psychological Evaluation prepared by Dr. Robert Geffner and Ron Roberts)

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[32] The affidavits are from Miniel' s adopted family (Docket Entry No. 7, Exhibits 17-22, affidavits of Jesse Miniel, Manuel Miniel, Maria Juana Miniel, Maria Socorro LeBlanc, Mary Margaret Miniel, and John P. Miniel) and his natural mother (Docket Entry No. 7, Exhibit 23, affidavit of Carmen Cantu).

According to the report, this dysfunction caused Miniel to act without thinking and rendered him unable to plan ahead. Also, due to his brain dysfunction and "Post Traumatic Stress Disorder" symptoms, Miniel acts with violence and cannot control his impulses. The report also identifies that Miniel may suffer neurological impairment from a variety of sources, including his mother's alcohol abuse while pregnant, and his childhood injuries or abuse. The report indicates that "it is possible that the conditions were present at the time of trial.

In the state habeas proceedings the State produced an affidavit from trial counsel stating that he discussed mitigation strategy with Miniel. See Ex parte Miniel, No. 450033-A, 1054-58, affidavit of Fred Heacock dated February 4, 1999. Trial counsel stated that he never observed any indication of mental health problems or retardation in his client. When trial counsel asked Miniel about any history of substance abuse, Miniel only referred to his substance abuse at the scene of the crime. Trial counsel stated that he talked with Miniel's family members before trial, including phone conversations with his father. The family did not suggest to trial counsel those areas of mitigating evidence reflected in their affidavits. Trial counsel noted that Miniel's family was present for only a portion of the trial, and they did not display warm feelings toward Miniel. Trial counsel asked family members to testify that Miniel should not receive a death sentence, but they refused to do so. Trial counsel did not subpoena family members to testify because "there was a certain warmth missing in their feelings for Miniel and [he) could not be sure of what they might say on cross-examination." See Ex parte Miniel, No. 450033-A, at 1057, affidavit of Fred Heacock dated February 4, 1999.

The state habeas court found trial counsel's affidavit to be credible. See Ex parte Miniel, No. 450033-A, at 1177, q 22. The court found that Miniel was involved in all of the strategic mitigation decisions. See id. Even though the

family members offered mitigating evidence in their affidavits, the state habeas court noted that none of them indicated that they would be available for trial and none were present for the entirety of the trial. See id. at 1177, 1 25. The habeas court found trial counsel's explanation that family members did not act favorably toward Miniel and did not want to be involved to be credible. See id. at 1177, 1 26. The state habeas court concluded that Miniel had not shown deficient performance or prejudice with respect to this claim. See id. at 1189-90, 11 2-9. Specifically, the court noted that Miniel had not shown that there were witnesses willing to testify in his behalf or that their testimony would have benefited the defense. See id. at 1190,4. Further, the court held that trial counsel did not render ineffective assistance in failing to have Miniel evaluated by a psychological expert. See id. at 1190, 7. This court will review these findings and conclusions under the AEDPA. See 28 U.S.C. § 2254(d)(1).

a. Deficient performance

The Strickland standard mandates that trial counsel's decision not to present mitigating evidence be granted deference when that decision is fully informed, strategic, and expected to either generate some benefit or avoid some harm to the defendant. See Moore, 194 F.3d at 614. In essence, when available mitigating evidence is not presented, this court will focus on the reason for the decision not to present the evidence. Id. Whether a decision not to present any evidence at sentencing constitutes ineffective counsel assistance depends on whether the decision was based on an informed and reasoned practical judgment. See Mattheson v. King, 751 F.2d 1432, 1441 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986).

Trial counsel's affidavit demonstrates that he consulted with his client concerning possible mitigating evidence, but that his client did not provide a fruitful source

of mitigation. Miniel apparently did not indicate to counsel that his family would provide mitigating evidence of childhood abuse, chemical dependency, or other factors. Trial counsel's affidavit demonstrates that he attempted to secure assistance from Miniel's family, but that they were not disposed to help. Even when requested by trial counsel to plead for Miniel's life, most of his family members did not even stay in Houston for the punishment phase of Miniel's trial. While his family now recounts mitigating circumstances, they do not state that they would have presented such testimony in the punishment phase of trial, or that they were even inclined to stay for the whole trial.

As for the psychological evidence, trial counsel stated that there was no indication of mental impairment on the part of Miniel. The pretrial evaluation found him to be sane and competent. Nothing in the record suggests that trial counsel should have been alerted to potential mental deficiencies. Even the report submitted in the state habeas proceedings does not link any psychological impairment to the crime, nor does it concede but a probability that Miniel suffered from psychological impairment at the time of the offense or trial. No deficiency is evident in trial counsel's failure to seek psychiatric assistance.

"Even if we were to assume that his trial counsel failed to make an adequate investigation, [Miniel] has failed to show that counsel would have made a different decision about trial strategy if they had investigated and amassed the information contained in the affidavits of the proposed witnesses." Lamb v. Johnson, 179 F.3d 352, 359 (5th Cir.), cert. denied, 528 U.S. 1013 (1999). Trial counsel's interaction with Miniel's family did not provide a favorable impression of how they would testify during the punishment phase. Trial counsel was apparently concerned that on cross-examination Miniel's family would not provide helpful testimony. Moreover, trial counsel's strategy to present evidence of

reformation and religion could have been hampered by the potential testimony, especially that of the psychologist painting a picture of an uncontrollably and permanently violent individual.

The state habeas court reasonably concluded that trial counsel did not render deficient performance. The state habeas court decision was not contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1).

b. Prejudice

Miniel's ineffective assistance claim also fails for a lack of prejudice. A court must balance the evidence presented at the punishment hearing against that which the petitioner claims should have been presented. See Ransom v. Johnson, 126 F. 3d 716, 723 (5th Cir.), cert. denied, 522 U.S. 944 (1997). During the punishment phase of Miniel's trial, the State introduced evidence of many prior offenses committed by Miniel in Illinois, including aggravated battery from beating his girlfriend, see Trans. vol. 28, at pp. 35, 59; another charge of aggravated battery where Miniel beat someone with numchucks, see Trans. vol. 28, at pp. 42-43; two unlawful-use-of-weapons charges, see Trans. vol. 28, at pp. 37-38; a retail theft charge, see Trans. vol. 28, at p. 47; and a charge of disorderly conduct, see Trans. vol. 28, at p. 48. The State also presented evidence of Miniel's poor parole history. See Trans. vol. 28, at pp. 37-38, 48-49. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person. See Trans. vol. 28, at pp. 45, 63, 71.

When comparing Miniel's violent history, including the horrific manner in which he killed Manier, with the potential testimony that centered on childhood abuse and substance abuse, there is no reasonable probability that the jury would have answered the special issues in a different

manner. Specifically, Miniel's past violent behavior would overwhelm any of the proposed mitigating evidence in determining future dangerousness. In sum, the proposed mitigation evidence "would have had little mitigating effect against the evidence . . . ." Lamb, 179 F.3d at 360. Miniel has failed to present "evidence of sufficient quality and force to raise a reasonable probability that, had it been presented to the jury, a life sentence would have resulted." See Andrews v. Collins, 21 F.3d 612, 624 (5th Cir. 1994), cert. denied, 513 U.S. 1114 (1995).

Furthermore, the evidence presented in the family affidavits is not unequivocally mitigating. There is no prejudice to a defendant when counsel fails to present evidence that would have been detrimental to the defense. See Ransom, 126 F.3d at 724; Cockrum v. Johnson, 119 F.3d 297, 304 (5th Cir. 1997) (failure to investigate mitigating evidence did not prejudice the defendant -- because of the double-edged nature of the evidence) :" [E] vidence a defendant's abuse-filled, violent upbringing and abuse of drugs and alcohol frequently can be 'double-edged.'" Williams v. Cain 125 F.3d 269, 278 (5th Cir. 1997), cert. denied, 525 U.S. 859 (1998).

Miniel's mitigating evidence may have harmed his defense. For instance, Miniel's sister reveals that at the time of his arrest Miniel confronted the police with a shotgun, only lowering the weapon in response to her pleas. (Docket Entry No. 7, Exhibit 19 at p. 17) Also, the accidents that some members pointed to as deeply impacting Miniel's life occurred as a result of intoxication. (Docket Entry No. 7, Exhibit 19 at p. 17) Additionally, the affidavits recognize that Miniel had opportunities to seek help for his substance dependency, but did not avail himself of those opportunities. (Docket Entry No. 7, Exhibit 17 at p. 7) Likewise, the psychological evidence about Miniel's violent tendencies may have confirmed his future danger to society.

The state court determination that trial counsel did not render ineffective assistance in failing to present mitigating evidence is not contrary to, or an unreasonable application of, federal law. See 28 U.S.C. S 2254(d)(1).

3. Confession of quilt during closing

Pointing to trial counsel's statements in closing arguments, Miniel argues that trial counsel conceded his guilt, guaranteeing that he would be convicted of capital murder. However, trial counsel's obvious strategy in closing was to turn the jury's anger away from his client and onto Russell. Trial counsel faced an understandably difficult decision. The State produced strong evidence indicating that Miniel killed Manier, including testimony about Miniel's own confession. Sensing the strength of the State's case, trial counsel decided to focus on seeking a comparable.

* * * * *

NO. 450033-A

EX PARTE § IN THE 337th DISTRICT COURT

§ OF

PETER MINIEL,
aka PETER HERNANDEZ
Applicant § HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having reviewed the applicant's application for writ of habeas corpus, the Respondent's Original Answer, and the official court documents, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Peter Miniel, the applicant, was convicted by a jury for the capital murder of Paul Manier in cause number 450033, in the 337th District Court of Harris County, Texas. After the jury affirmatively answered the special issues, the trial court sentenced the applicant to death.

2. The Court of Criminal Appeals affirmed the applicant's conviction in an opinion delivered January 22,1992. Miniel v. State, 831 S.W.2d 310 (1992).

3. On October 5, 1992, the United States Supreme Court denied the applicant's petition for writ of certiorari. Miniel v. Texas, 506 U.S. 885 (1992).

4. The Honorable Johnny Kolenda presided over the instant trial.

5. Defense counsel Fred Heacock was appointed on December 4, 1986 to represent the applicant as lead counsel in the instant trial. Al Thom was appointed as co-counsel on December 23, 1986.

Findings of Fact - First Ground for Relief:

6. Applicant's co-defendant, James Russell was arrested on May 22, 1986 and on that same date gave a written statement to the police. *Respondent's Original Answer, Exhibit A.*

7. The State called James Russell as a witness in the guilt/ innocence phase of the applicant's trial wherein Russell testified that the applicant told him that he thought the complainant had money and that they should rob the complainant after Rogers went to bed; that Russell was not in favor of robbing the complainant; that the applicant wanted Russell to tell the complainant that they had some cocaine in the car and Russell would get the cocaine; that it was the applicant's idea to knock the complainant unconscious and rob him; that the applicant and complainant were in the bedroom when Russell returned from the car; that, while the complainant cleaned a mirror for the cocaine, the applicant hit the complainant in the back of the head with a beer mug; that the applicant wanted the complainant dead so that he could rob him; that, after the applicant stabbed the complainant and tried to cut the complainant's throat, the applicant told Russell to get the stereo; that Russell left the bedroom, and the applicant came out of the bedroom two to five minutes later; that Russell left because he was afraid of the applicant and thought the applicant would kill him on the morning after the instant offense; that Russell was arrested in Brookshire, Texas, on May 22, 1986; that Russell cooperated with the police and gave a written confession; that Russell helped the police recover the knife; that Russell plead guilty to the instant offense on August 19,1987; that Russell had been in prison since December 30, 1987; that Russell pled guilty in

the instant case for fifty years in prison and to testify against the applicant; and, that Russell plead guilty because he was scared (R. XXV - 92-94, 104-106,119-122).

8. The applicant also gave a taped statement to the police on May 22,1986 wherein he states that he and Russell discussed robbing the complainant prior to the complainant's murder. *Respondent's Original Answer, Exhibit B.*

9. The Court finds based on a review of the statement of facts of the instant case, Applicant's Amended Petition for Post-Conviction Relief and Respondent's Original Answer, that applicant's codefendant James Russell's recantation in his 1993 statement conflicts with his May 22, 1986 statement, the bulk of his trial testimony and the applicant's own taped statement.

10. Based on the credible assertions in the affidavits filed by Ira Jones, Jim Lindeman and applicant's trial counsel, Fred. Heacock, the court finds that the State did not withhold any exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Respondent's Original Answer, Exhibit C, D and E, Affidavits of Ira Jones, Jim Lindeman, and Fred Heacock.*

11. The Court further finds based on the credible assertions in these affidavits, that there is no evidence to support Russell's claim that he was threatened or coerced into testifying against the applicant in the instant trial by anyone. *Respondent's Original Answer, Exhibit C D and E, Affidavits of Ira Jones, Jim Lindeman, and Fred Heacock.*

Findings o f Fact - Second Ground for Relief:

12. Based on the credible assertions in the applicant's trial counsel's affidavit, the Court finds that applicant's trial counsel's decision not to cross-examine codefendant Russell,

was a matter of trial strategy to limit, and not emphasize, the applicant's involvement in the guilt/ innocence stage. *Respondent's Original Answer, Exhibit E, Affidavit of Fred Heacock.*

13. Wesley Sheldon, a latent print examiner for the Houston Police Department, testified that there were no fingerprints recovered from the stainless-steel knife, and that there were no prints suitable for identification recovered from either of the shock absorbers. (R. XXV-84).

14. The defense did not cross-examine Sheldon. The Court finds that trial counsel's decision not to cross-examine Sheldon was a matter of trial strategy based on trial counsel's credible assertion that it was his experience and practice to leave a witness alone and not conduct any cross-examination *if he or she does not hurt the defense on direct examination. Respondent's Original Answer, Exhibit E, Aff fidavit o f Fred Heacock.*

15. The Court finds based on a review of the trial record that the applicant's trial counsel made appropriate objections when necessary to the State's leading questions.

16. The Court finds based on a review of the trial record that trial counsel's statements to the jury. in his closing argument were consistent with his trial strategy of admitting the offense in guilt/innocence and instead focusing on trying to persuade the jury to give the applicant life instead of death during the punishment phase.

17. The Court finds based on a review of the trial record and based on the credible assertions in defense counsel Heacock's affidavit, that the applicant's trial counsel cross-examined State's witnesses in an appropriate manner and consistent with his trial strategy.

18. The applicant did not testify at the guilt/ innocence or punishment stage of the trial.

19. Based on the credible assertions in trial counsel's affidavit, the Court finds that after conferring with trial counsel, the applicant decided that he did not want to testify at either stage of the trial and that trial counsel's concerns about the applicant being subject to cross-examination by the State, in light of the applicant's lack of remorse, were reasonable and consistent with their trial strategy. *Respondent's Original Answer, Exhibit E, Affidavit of Fred Heacock.*

20. The Court further finds, after reviewing the transcript and the record in the instant case, that trial counsel objected to the exclusion of an instruction on the voluntariness of the confession and submitted a written requested instruction which was subsequently denied by the trial court. (T. IA - 322).

21. The Court of Criminal Appeals held on the applicant's direct appeal that the evidence in the applicant's case did not raise the issue of voluntariness to mandate the requested jury instruction. *Miniel v. State*, 831 S.W.2d 310, 317 (Tex. Crim. App. 1992).

22. Based on the credible assertions in trial counsel's affidavit, the court finds that the applicant was involved in all of the strategy decisions that took place during his trial and despite the applicant's initial request to have his counsel removed from the case, he withdrew his motion after he conferred with counsel and was questioned by the trial court.

23. Applicant called three witnesses whom had come to know the applicant since the commission of the offense to testify on his behalf at punishment.

24. These witnesses testified to mitigating evidence on behalf of the applicant: specifically, that applicant had not been a discipline problem at the jail; that applicant had attended almost every religious service held at the jail since he had been confined; that his attitude had changed; and, that the applicant had made a true commitment to repent for his sins. (R. XXVIII - 78-80; 85-90; 96-102,104).

25. The Court finds after reviewing the affidavits filed by. the applicant's family members in his Amended Petition for Post-Conviction Relief, that none of these family members indicate that they would have been available and willing to testify on the applicant's behalf. The Court further finds based on these affidavits and that of trial counsel, that most of these witnesses were not even present for the entirety of applicant's trial.

26. The Court finds based on the credible assertions in trial counsel's affidavit, that he spoke to the applicant's family members who were present for part of the trial and that they did not want to participate or get involved; that they did not appear to have warm feelings about the applicant; and. that when asked specifically by trial counsel that someone should testify that applicant should not get the death penalty, none of the applicant's family wished to do so. *Respondent's Original Answer, Exhibit E.*

27. The applicant fails to provide any "extensive records" that he claims exist to support his claim that he had a troubled history.

28. The Court finds that applicant was evaluated for sanity and competency pursuant to a court order prior to his trial. The Court further finds that on October 6, 1987, the applicant was interviewed by Dr. Jerome Brown, a clinical psychologist employed by Harris County Mental Health and Mental Retardation. Dr. Brown prepared a report of his findings

based on his interview with the applicant and concluded that that the applicant was sane at the time of the offense and was competent to stand trial. The applicant did not indicate to Dr. Brown that he had a long history of physical and emotional abuse and abandonment (T. I - 34-37).

29. Based on the credible assertions in trial counsel's affidavit and Dr. Brown's psychological evaluation, the Court finds that the applicant was evaluated by a psychological expert prior to trial and that trial counsel's observations of applicant were consistent with those made by Dr. Brown, i.e. that the applicant failed to demonstrate any signs of psychological problems or mental illness. *Respondent's Original Answer, Exhibit E; (T. I - 34-37).*

30. The court finds that based on a review of the trial record that both of the applicant's trial counsel vehemently argued at the punishment phase that the jury should spare the applicant's life, just as the codefendant's had been spared. The Court further finds that this argument was consistent with counsels' trial strategy throughout the applicant's trial.

Findings of Fact - Third Ground for Relief:

31. Concerning the applicant's claim that the trial court failed to inquire into applicant's dissatisfaction with trial counsel, the Court finds that the trial court conducted a hearing after which the applicant withdrew his first request to have counsel removed. Moreover, the Court finds that, while not required, the trial court also ruled on the applicant's pro se motions, most of which were duplicitous of those filed by trial counsel.

32. Applicant made his second request to have trial counsel removed during trial after the jury was selected. The trial court did not err in failing to replace trial counsel as the applicant failed to timely assert his second motion for new

appointed counsel, and the applicant failed to demonstrate adequate reason for such action by the trial court.

Finding of Fact - Fourth Ground for Relief:

33. Because Texas' state courts employ a court-appointed attorney system, rather than a public defender system, the applicant fails to show how the system of appointing counsel in a capital case deprived him effective assistance of counsel.

Finding of Fact - Fifth Ground for Relief

34. Based on the credible assertions in the affidavits of the applicant's trial counsel and of the prosecutor, the Court finds that there were no "deals" between the State and the defense concerning the cross-examination of the applicant's codefendant.

Russell. Moreover, the Court finds that trial counsel's rationale behind not crossexamining Russell was based on the defense's trial strategy and the decision was made after consulting with the applicant. *Respondent's Original Answer, Exhibits C & E, Affidavits of Ira Jones and Fred Heacock.*

Findings of Fact - Sixth Ground for Relief:

35. The Court finds after a review of the record in the instant case, that the prosecutor's arguments complained of by the applicant fall within the four permissible area of jury argument.

36. Concerning the applicant's complaint of improper comments made by the prosecutor during the trial, the Court finds based on a review of the trial record that any harm resulting from the comments was cured by an objection by the defense, removal of the jury and an instruction to disregard which was given by the trial court. The Court further finds,

37. The Court finds that the applicant has failed to prove that the prosecutor engaged in misconduct when the State requested a psychiatric examination of the applicant.

Findings of Fact - Seventh Ground for Relief:

38. The Court finds based on a review of the trial record that the trial court did not err in failing to excuse venireperson Patrick O' Rourke for cause because he clearly demonstrated that he understood the legal definitions, was fully capable of following the law and fairly and impartially answering the punishment issues.

39. Further, there is no evidence in the record to support the applicant's assertions that the State misstated the law in voir dire or impermissibly zed the jury's -responsibility for the death sentence.

Finding of Fact - Eighth Ground for Relief:

40. The Court finds that the trial court did not err in excusing venireperson Hernandez because she unequivocally stated that her feelings regarding the death penalty were such that she could not serve on the jury or take the oath; and, that her mind could not be changed regarding her inability to take the oath as a juror. (R. XV - 2812-2815).

Finding of Fact - Ninth Ground for Relief:

41. Based on a review of the entirety of the voir dire of vernireman Frederick Jones, Joseph Foster, Jr. and Dorothy Campbell, the Court find that each of these prospective jurors understood the various legal burdens and distinctions, that each could follow the law, that each could consider the evidence, that each could be fair to both the applicant and the State, and that each could participate as a juror in a capital murder case. The Court further finds that trial court properly

denied the applicant's challenge for cause to these venirepersons because there is ample support in the record that each prospective juror's views would not prevent or substantially impair his ability to serve as a juror.

Findings of Fact - Tenth Ground for Relief:

42. Based on a review of the voir dire examination by the State of venirepersons Juan Jacquez, Sheryl Jeter, and Dennis Bellow, the Court finds that the prosecutor correctly explained the relevant law concerning the law of parties and also finds that the State never implied that the deliberate conduct of a co-defendant could be considered in answering the special issues.

43. The applicant fails to name or detail the jurors that he claims were struck by the State because they indicated an unwillingness to follow the law of parties in making the sentencing determination.

Findings of Fact - Eleventh Ground for Relief:

44. The trial court instructed the jury on the law of parties at the guilt/innocence stage of the applicant's trial. The jury charge at the punishment phase did not contain an instruction that the parties charge could not be considered during punishment.

45. Applicant's claim that the trial court erred in failing to instruct the jury that the law of parties does not apply at the sentencing phase of a capital trial is procedurally barred because the applicant failed to object on this ground. Moreover, the punishment charge focused solely on the conduct of the applicant, and made no mention of any codefendant. Additionally, the Court finds that the prosecutor's punishment argument focused on the actions of

the defendant and not on the actions of the codefendant, Russell.

Finding of Fact - Twelfth Ground for Relief:

46. The Court finds based on the credible assertions in the prosecutor's affidavit, that the copy of the trial court's guilt/ innocence charge to the jury contained in the "State's Motion to Supplement the Record" is identical to the charge that was read to the jury at the applicant's trial, excluding the prosecutor's handwritten notes.

Findings of Fact - Thirteenth Ground for Relief:

47. The applicant's claim that the special issues act as aggravating circumstances in capital murder cases because their function is to narrow the class of persons eligible for the death penalty and his claim that the trial court's failure to define the terms in the second special issue misled the jurors are without merit and moreover, are procedurally barred because the applicant failed to object; therefore nothing is preserved for review.

48. The Court finds that the narrowing function in capital murder cases occurs at the guilt/innocence phase of trial due to the narrow description of the offense of capital murder as defined in Tex. Penal Code § 19.03.

49. The Court further finds that the applicant has offered no authority in support of his allegation that the lack of defining the terms contained in the second special issue renders the statute unconstitutional. Moreover, the applicant has failed to show how the lack of definition for the terms complained of deprived him of a fair trial under the instant facts.

Finding of Fact - Fourteenth Ground for Relief:

50. Despite the applicant's failure to object at trial resulting in a waiver of the claim, the Court finds, that based on a review of the punishment charge, the Court finds that the trial judge properly instructed the jury as to the special issues. Accordingly, the jury was adequately and accurately informed concerning the requirements of a jury verdict and the jury's responsibility.

Finding of Fact - Fifteenth Ground for Relief:

51. The Court finds based on a review of the trial record, that the trial court conducted a *Jackson v. Denno* hearing on the voluntariness of the applicant's oral confessions and found that they were voluntary and were not made under the direct or implied influence of threats, violence, coercion, duress, or other improper influence. (R. IA - 391). The Court of Criminal Appeals found sufficient evidence to support the trial court's findings on the applicant's direct appeal. The Court finds that because this issue was previously considered and rejected on the applicant's direct appeal, it need not be reconsidered.

52. Further, the Court finds that applicant's claim that he was questioned by Detective Peterson of the Chicago Police Department while en route to the police station without giving his *Miranda* warnings is without merit. Detective Peterson testified at the *Jackson v. Denno* hearing that he had no conversation with the applicant, other than telling him where to sit and that he did not read him the *Miranda* warnings. Moreover, the applicant did not testify at the *Jackson v. Denno* hearing that there was any communication between himself and Detective Peterson on the way to the police station. Finally, the applicant never alleges that the officers alleged questions elicited a response from the applicant other than the applicant requesting an attorney, hence, there is no

suppression issue and the allegation that the officer did not give the applicant his Miranda warnings is of no consequence.

Finding of Fact - Sixteenth Ground for Relief:

53. Based on a review of the Court's file and the trial record, the Court finds that the trial court properly denied the applicant's motion to dismiss the indictment for want of a speedy trial due to the complex nature of the instant case, the applicant's delay in filing his speedy trial motion, the applicant fighting extradition back to Texas and the applicant's f allure to demonstrate any sort of prejudice.

Finding of Fact - Seventeenth Ground for Relief:

54. While the applicant delineates alleged mitigating evidence that the jury could have considered at trial, the Court finds that that none of this evidence was actually presented at the applicant's trial which is required by *Penry*. Moreover, unlike Penry, the Court finds that the applicant has failed to show that he suffers from a mental defect or that there is any evidence that the applicant is incapable of learning, incapable of knowing right from wrong or incapable of functioning in society.

Finding of Fact - Eighteenth Ground for Relief:

55. The Court finds based on a review of the record, that the applicant's evidence concerning his childhood and his alcohol and drug abuse, to the extent that a jury considers such evidence to have a mitigating value; could have been given full effect within the scope of the special issues.

Finding of Fact - Nineteenth Ground for Relief:

56. The Court finds that the applicant failed to object or submit a proposed . instruction to the punishment charge

concerning prior unadjudicated offenses. Moreover, the Court further finds based on a review of the punishment charge, that the instructions to the jury required that the State prove all punishment issues beyond a reasonable doubt. (R. IA - 334).

Finding of Fact - Twentieth Ground for Relief:

57. The Court finds that, based on a review of the trial record, that the State introduced evidence at the punishment stage of the applicant's prior criminal record, his probation records and character evidence concerning the applicant's reputation in the community for violence. The applicant did not object to the State's punishment evidence, thereby failing to properly preserve the issue and waiving any claim.

Finding of Fact - Twenty-First Ground for Relief:

58. The Court finds that the applicant failed to object at trial to the court's failure to include a definition of the meaning of a life sentence or offer a proposed instruction on parole law to be included in the punishment charge. Therefore, the applicant's claim is procedurally barred because the applicant failed to object. Notwithstanding the applicant's procedural bar, the Court finds that the applicant's due process were not violated because the trial court did not instruct the jury on the meaning of parole law and the definition of a life sentence.

Finding of Fact - Twenty-Second Ground for Relief:

59. The Court finds that the trial court properly charged the jury that the State must prove each special issue beyond a reasonable doubt; that, before answering a special issue affirmatively, the jury had to be convinced by the evidence beyond a reasonable doubt that the answer to the special issue should be "Yes," and that, if any juror, after considering the evidence and instructions, had a reasonable doubt as to whether the answer to a special issue should be in the

affirmative, the juror should vote "No" to that special issue. (R. IA - 334). The Court finds that based on a review of the punishment charge, that the term "probability" in the second special issue does not change the burden of proof that the State is required to prove.

Finding of Fact - Twenty-Third Ground for Relief:

60. The Court finds that the applicant failed to preserve error with regard to his claim that he was harmed by Texas' alleged unconstitutional juror challenge statute because he failed to object at the trial level.

Finding of Fact - Twenty-Fourth Ground for Relief:

61. Based on a review of the voir dire proceedings and the arguments at punishment, the Court finds that that the jury was well aware of its responsibility and of the consequences of its answers to the special issues.

Finding of Fact - Twenty-Fifth Ground Relief:

62. The Court finds based on a review of the trial record, that the applicant's codefendant. James Russell, testified that the applicant had a tattoo on his right arm. (R. XXV -124). At the State's request and over the defense's argument that identity was not an issue, the Court directed the applicant to display his tattoo to the jury. Moreover, Sammy Rogers, the complainant's roommate, testified that the applicant had a tattoo on his shoulder. (R. XXV -202). Because the applicant's display of his tattoo to the jury was cumulative of the testimony of Russell and Rogers, the applicant has failed to show that his right to a fair trial was violated.

Findings of Fact - Twenty-Seventh through Twenty-Ninth Grounds for Relief:

63. The Court finds that the applicant's claims that his sentence is excessive and disproportionate; that capital punishment is an excessive penalty which fails to serve any rational and legitimate social interest; and, that the State of Texas unconstitutionally applies the death penalty in an arbitrary, capricious, and whimsical fashion are without merit.

64. Despite the applicant's failure to object at trial, the Court further finds that the applicant fails to prove that the Texas death penalty scheme is facially unconstitutional or unconstitutional as applied, based on the bare allegation that the death penalty is assessed in a discriminatory manner.

65. The Court finds that the applicant fails to demonstrate any "state and federal constitutional and statutory infirmities in the trial and review" of the instant case.

CONCLUSIONS OF LAW

Conclusion of Law - First Ground for Relief:

1. The applicant f ails to show that codefendant Russell's "eleventh hour" recantation merits any consideration. It is not unusual for one of two convicted accomplices to assume the entire fault and thus, exculpate his codefendant by the filing of a recanting affidavit or other statement. It should go without saying that not every recanting or other statement requires a new trial of the other defendant for whose benefit it is produced. *Drew v. State*, 743 S.W.2d 207, 228 (Tex. Crim. App. 1987).

Conclusions o f Law - Second Ground for Relief

2. The applicant fails to demonstrate deficient performance of trial counsel, much less harm during the guilt/ innocence phase of the applicant's trial in the following areas: (1) alleged failure to cross-examine witnesses; (2) alleged failure to object; (3) alleged failure to effectively argue to the jury during closing argument; (4) allegedly assisting the prosecutor in inflaming the minds of the jurors against the applicant; (5) alleged failure to offer evidence; (6) alleged failure to effectively cross-examine witnesses; and (7) failure to request an instruction concerning the applicant's allegedly coerced confession. *Strickland v. Washington*, 466 U.S. 668, 694(1984).

3. The decision to cross-examine a witness is largely a matter of trial strategy and is the prerogative of trial counsel. *Coble v. State*, 501 S.W.2d 344, 346 (Tex. Crim. App. 1973).

4. Applicant has f ailed to show that not only that there were witnesses who were available to testify in his defense, but how their testimony would have benefited the defense. See *King v. State*, 649 S.W.2d 42,44 (Tex. Crim. App. 1983).

5. Applicant 's claim that his counsel was ineffective for failing to object to and request an instruction on the voluntariness of the confession has no merit.

6. An accused does not have the right to have his choice of appointed counsel. Unless an accused waives his right to counsel and chooses to represent himself, or shows adequate reason for the appointment of new counsel, he must accept the counsel appointed by the court. *Dunn v. State*, 819 S.W.2d 510, 520 (Tex. Crim. App. 1991); *Renfro v. State*, 586 S.W.2d 496,499-500 (Tex. Crim. App. 1979).

7. Applicant's claim that trial counsel failed to have the applicant evaluated by a psychological expert has no merit.

8. Because a jury decides not to accept trial counsel's argument, does not make it ineffective.

9. Counsel is not required to present an errorless trial in order to be effective; moreover, the competency of representation is not to be judged by hindsight or by facts unknown at the time of trial. **Strickland**, 466 U.S. at 690.

Conclusion of Law - Third Ground for Relief:

10. Applicant's claim that the trial court failed to inquire into his dissatisfaction with counsel has no merit. Applicant's claim is procedurally barred because the applicant withdrew his first motion to dismiss trial counsel after the court conducted a hearing and his second motion to dismiss trial counsel was untimely urged. Because the applicant has failed to preserve error as to the instant claim, he has waived any complaint. *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1982). Unless an accused waives his right to counsel and chooses to represent himself, or shows adequate reason for the appointment of new counsel, he must accept the counsel appointed by the court. *Dunn v. State*, 819 S.W.2d 510, 520 (Tex. Crim. App. 1991). Moreover, a trial court is under no duty to search until it finds an attorney agreeable to the accused. *Malcolm v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982).

Conclusions of Law - Sixth Ground for Relief:

11. Applicant fails to show that the prosecutor's arguments fell outside of the four distinct categories of proper jury argument: (1) summary of the evidence; (2) reasonable deduction from the evidence; (3) in response to argument of

opposing counsel; and (4) plea for law enforcement. *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990).

12. An error in asking an improper question or in admitting improper testimony may be cured or rendered harmless by the withdrawal of such testimony and an instruction to disregard the same. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987).

13. Where no objection is made, nothing is presented for review, even if the argument is so prejudicial that any harmed caused could not have been cured by ,an instruction to disregard. *Cockrell v. State*, 939 S.W.2d 73, 89 (Tex. Crim. App. 1996); see also *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1982).

14. Article 46.02 Section 3(a), V.A.C.C.P., provides that "at any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue".

Conclusions of Law - Seventh and Tenth Grounds for Relief:

15. A prospective juror is not disqualified. as a matter of law from serving as a juror in a capital murder case simply because that prospective juror expresses strong feelings in favor of imposing the death sentence. *Cordova v. State*, 733 S.W.2d 175,184-185 (Tex. Crim. App. 1987).

16. In order to prevail on a claim that the trial court erred excusing a venireperson for cause, an objection must be lodged during voir dire and/or at the time of the trial court's

ruling. *Zimmerman v. State*, 860 S.W.2d 89,94 (Tex. Crim. App. 1993).

17. A trial court's decision to excuse a prospective juror is reviewed under an abuse of discretion standard because "great deference must be given to the trial court who is in the best position to see and hear the prospective jurors and to evaluate their responses." *Moody v. State*, 827 S.W.2d 875, 888-889 (Tex. Crim. App. 1992).

18. Moreover, the Court will reverse a trial court's ruling on the decision to excuse a prospective juror only when the record demonstrates a clear abuse of discretion. *Kemp v. State*, 846 S.W.2d 289,296 (Tex. Crim. App. 1992).

19. When a venireperson states that her convictions are so strong that she cannot take an oath, knowing that a death sentence is a possible result at trial, the venireperson is subject to challenge for cause. If the venireperson specifically states that she would be unable to take the oath required of a juror, then that venireperson has made it "unmistakably clear" that she could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge. *Goodwin v. State*, 799 S.W.2d 719, 731-32 (Tex. Crim. App. 1990).

20. In applying the abuse of discretion standard for the denial of a challenge for cause, the reviewing court must examine the prospective juror's entire voir dire to determine if it supports the trial court's implied finding that the prospective juror's views would not prevent or substantially impair the performance of his duties in accordance with his instruction and oath as a juror. *Johnson v. State*, 757 S.W.2d 744,752 (Tex. Crim. App. 1988).

21. It is axiomatic, that in a postconviction writ proceeding, the applicant must allege sufficient facts, which, if true, would entitle him to relief. ***Ex parte Maldonado***, 688 S.W.2d 114,116 (Tex. Crim. App 1985).

Conclusion of Law - Eleventh Ground for Relief:

22. Absent an objection or request, an "anti-parties" charge is not required by statute or by the constitution. *Johnson v. State*, 853 S.W.2d 527 (Tex. Crim. App. 1992).

Conclusion of Law - Twelfth Ground for Relief:

23. TEX. R. APP. P. 50 (e) provides that "[w]hen the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted, the record may be prepared and transmitted to the appellate court as in other cases."

Conclusions of Law - Thirteenth Ground for Relief:

24. The United States Supreme Court has examined the constitutionality of the Texas death penalty statute and has held it constitutional. *Jurek v. Texas*, 428 U.S. 262, 274 (1976); *Motley v. State*, 773 S.W.2d 283, 286-287 (Tex. Crim. App. 1989).

25. It is well settled that all words, phrases and terms in the Texas Code of Criminal Procedure are to be taken and understood in the usual acceptation of common language, except where specifically defined. *Tex. Code Crim. Proc: Ann.* art. 3.01 (Vernon 1988). Moreover the Court of Criminal Appeals has held that the trial court need not define terms such as "probability," "criminal acts of violence," or "continuing threat to society." *Cantu v. State*, 842 S.W.2d 667, 691 (Tex. Crim. App. 1992); *Corwin v. State*, 870 S.W.2d 23 (Tex. Crim. App. 1993).

Conclusion of Law - Fourteenth Ground for Relief:

26. *Tex. Code Crim. Proc.* art. 37.071(d) (Vernon 1988) pro /ides that if the jury returns a negative finding to a special issue or is unable to answer any special issue, the trial court shall sentence the defendant to confinement for life. Moreover, art. 37.071(g) specifically provides that the trial court or the attorneys may not inform a juror or a prospective juror of the effect of the failure of the jury to agree on a special issue. The Court of Criminal Appeals has addressed the constitutionality of this Article and found constitutional the provision which prohibits informing the jury of the result of its failure to agree. *Davis v. State*, 782 S.W.2d 211(Tex. Crim. App. 1989).

Conclusion of Law - Fifteenth Ground for Relief:

27. The Court of Criminal Appeals held on the applicant's direct appeal that there was sufficient evidence to support the trial court's finding that the applicant's oral statements were voluntary and found no error in the refusal to suppress the applicant's oral statements. *Miniel v. State*, 831 S.W.2d at 313-315. Moreover, because the voluntariness of the applicant's confession was previously raised and rejected on direct appeal, there is no need to reconsider the issue. *Ex parte Acosta*, 672 S.W.2d 470,472 (Tex. Crim. App. 1984).

Conclusion of Law - Sixteenth Ground for Relief:

28. Applicant has failed to show that he was denied his constitutional right to a speedy trial based on the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530-533 (1972): (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right, and (4) the prejudice to the defendant resulting from the delay.

Conclusion of Law - Seventeenth and Eighteenth Grounds for Relief:

29. *Penry v. Lynaugh*, 492 U.S. 302 (1989) requires the introduction of mitigating evidence before a jury, not allegations of mitigating evidence proffered years later to an appellate court in habeas corpus proceedings which is the situation with respect to applicant's instant claims. Moreover, the Court of Criminal Appeals will not consider mitigating evidence that was not presented at trial for tactical or strategic reasons unrelated to the functioning of art. 37.071. Ex parte Allridge, 820 S.W.2d 152 (Tex. Crim. App. 1991).

Conclusion of Law - Nineteenth Ground for Relief:

30. Where the charge to the jury properly requires the State to prove each of the special issues beyond a reasonable doubt, no burden of proof instruction concerning extraneous offenses is required. *Burks v. State*, 811 S.W.2d 105,123124 (Tex. Crim. App. 1991).

Conclusions of Law - Twentieth Ground for Relief:

31. The Court of Criminal Appeals has consistently held that unadjudicated offenses are admissible during the punishment phase of a capital murder trial. *Kemp v. State*, 846 S.W.2d 289, 307 (Tex. Crim. App. 1992). Additionally, the Court has long held that admission of extraneous unadjudicated offense does not violate an accused's constitutional rights to due process and equal protection. Id. at 307.

32. Failure to properly preserve a claim for review results in a waiver of that claim. *Hodge v. State*, 631 S.W.2d 754,757 (Tex. Crim. App. 1982).

Conclusion of Law - Twenty-First Ground for Relief:

33. The Court of Criminal Appeals has held that the Texas Constitution prohibits, without legislative action, the jury to consider parole in any mariner when considering whether a capital defendant should be sentenced to life or death. *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995).

Conclusion of Law - Twenty-Second Ground for Relief:

34. The Court of Criminal Appeals has held that "the -use of the word 'probability' does not in any way reduce the burden of proving the special issues to anything less than beyond a reasonable doubt." *Sosa v. State*, 769 S.W.2d 909, 916 (Tex. Crim. App. 1989).

Conclusion of Law - Twenty-Third Ground for Relief:

35. The Court of Criminal Appeals has repeatedly determined that the capital murder jury selection process in Texas, which requires the accused to exercise his' peremptory challenges following examination of each individual juror rather than after all prospective jurors have been individually questioned, does not violate state or federal constitutional due process or equal protection provisions. *Janecka v. State*, 739 S.W.2d 813, 833-34 (Tex. Crim. App. 1987).

Conclusion of Law - Twenty-Fourth Ground for Relief:

36. The applicant has failed to show that there is nothing that operates to diminish the seriousness of juror deliberations or to suggest that ultimate responsibility for determining the propriety of a death sentence rests anywhere else than with the jury. *See Draughon v. State.* 831 S.W.2d 331 (Tex. Crim. App.1992).

Conclusions of Law - Twenty-Fifth Ground for Relief:

37. Evidence which is cumulative to the testimony of other witnesses in the case is harmless beyond a reasonable doubt. *Richardson v. State*, 744 S.W.2d 65, 85 (Tex. Crim. App.1987).

38. A failure to cite any authority, presents nothing for review. *Brooks v. State*, 642 S.W.2d 791, .797 (Tex. Crim. App.1982).

Conclusion of Law - Twenty-Sixth Ground for Relief:

39. Because the applicant's twenty-sixth ground for relief is simply a retooling of the applicant's claims set forth in his third, seventh, eighth, twelfth, and sixteenth grounds for relief and because the cited claims are without merit, the applicant's twenty-sixth ground f or relief is meritless.

Conclusions of Law - Twenty-Seventh through Twenty-Ninth Grounds for Relief:

40. The United States Supreme Court has examined the constitutionality of the Texas death penalty and held that the statute is constitutional. *Jurek v. State*, 428 U.S. 262, 274 (1976). Moreover, the Texas Court of Criminal Appeals has held that the imposition of the death penalty is not cruel and unusual punishment. *Shannon v. State*, No. 71,805, slip op. at 13 (Tex. Crim. App. December 11,1986).

41. The Court of Criminal Appeals has also held that the Texas death penalty statute is not unconstitutional on the ground that the death penalty is inflicted as a result of prosecutorial discretion. *Fearance v. State*, 620 S.W.2d 577 (Tex. Crim. App. 1981); *see also Livingston v. State*, 542 S.W.2d 655 (Tex. Crim. App. 1976).

42. The applicant has failed to allege and prove sufficient facts which, if true, would entitle the applicant to relief. Ex pane Maldonado, 688 S.W.2d 114,116 (Tex. Crim. App. 1985).

43. The applicant has failed to prove that his conviction was improperly obtained. Accordingly, it is recommended that the Court of Criminal Appeals deny the relief requested.

BY THE FOLLOWING SIGNATURE, THE TRIAL COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 450033-A.

S/ Larry Fuller
Presiding Judge

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 450033-A and transmit same to the Court of Criminal Appeals as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 450033-A;

2. the Respondent's Answer in cause number 450033-A;

3. this Court's findings of fact, conclusions of law and order;

4. the indictment, judgment, sentence, docket sheet, and appellate record in cause number 450033, unless they have been previously forwarded to the Court of Criminal Appeals;

5. any Proposed Findings of Fact and Conclusions of Law filed by either the applicant or Respondent; and

6. the affidavits of Jim Lindeman, Fred Heacock and Ira Jones filed in cause number 450033-A.

THE CLERK IS FURTHER ORDERED to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Mr. Thomas L. Johnson & Mr. Gregory Merz, Gray, Plant, Mooty, Mooty & Bennett, P.A., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota, 55402; and to Respondent: Kim Parks; 201 Fannin; Houston, Texas 77002-1901.

SIGNED this 28th day of June, 1999.

s/ Larry Fuller
JUDGE PRESIDING - 337th District Court

COUNSELING AND TESTING SERVICES
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CONFIDENTIAL NEUROPSYCHOLOGICAL AND PSYCHOLOGICAL EVALUATION

NAME: Peter J. Miniel
SEX: Male
AGE: 31
DOB: 6/23/62
RACE: Hispanic

EDUCATION: 8th grade
MARITAL STATUS: Single
DATES OF TEST: 6/25 & 6/26/93
DATE OF REPORT: 7/2/93

REASON FOR REFERRAL:

Peter Miniel was referred for a psychological and neuropsychological evaluation by his attorneys to determine whether neuropsychological brain impairment exists. This evaluation included Peter's level of intellectual, neuropsychological, and personality functioning. This was requested by his attorneys to assist in determining whether there were mitigating factors or other legal claims relevant to his case.

CONCLUSIONS IN BRIEF:

Peter Miniel is a 31 year old Hispanic male who has been incarcerated at Ellis I, Huntsville, Texas for the past 5 years. These 5 years have been spent on Death Row. The current evaluation indicates that Peter has incurred mild overall brain impairment, has below average intellectual functioning, has a long history of physical and emotional abuse and abandonment, and has a lengthy history of chronic substance abuse. The effects of this history and his neuropsychological dysfunction would be consistent with moderate impairment of his mental, cognitive, academic, social, and behavioral

functioning. The diffuse nature of his neuropsychological dysfunction limits his ability to use good judgment, to reason, and to inhibit impulsive behaviors.

INFORMATION REVIEWED:

Background information was obtained from Rockall School records, court documents, Sinnissippi Mental Health Center records, medical records, Whiteside County Court records (state of Illinois), Ellis One Unit records, and various other court affidavits and records.

TESTS & PROCEDURES:

Wechsler Adult Intelligence Scale - Revised (WAIS-R)
Wide Range Achievement Test - Revised (WRAT-R)
Bender-Gestalt Visual-Motor Test (Bender)
Randt Memory Test
Halstead-Reitan Neuropsychological Test Battery
Reitan-Indiana Aphasia Screening Test
Reitan-Klove Sensory Perceptual Exam
Wisconsin Card Sorting Test
Judgment of Line Orientation Test
Rey's Malingering Test
Draw-A-Person Projective Test (DAP)
Draw-A-Family Projective Test (DAF)
Thematic Apperception Test (TAT)
Minnesota Multiphasic Personality Inventory (MMPI)
Briere's Trauma Symptom Checklist
Dissociative Experiences Scale (DES)
Review of Previous Records
Social History Evaluation
Diagnostic Interview

FAMILY HISTORY:

Peter was born on June 23, 1962 in Chicago, Illinois. He was given up for adoption by his biological mother, Carmen Hernandez. His adoptive mother was Jessie Miniel who was Ms. Hernandez's older sister. Peter was reared by Jessie and Manuel Miniel. Peter had two biological siblings with whom he did not have much early contact. His adoptive family had six children, three girls and three boys. Peter's adoptive parents worked in blue collar jobs. Peter's records indicate that his family life was difficult due to financial difficulties and Manuel's serious alcoholism. His adoptive mother, Jessie, suffered from various psychiatric disorders, most noticeably severe anxiety and depression.

Peter appears to have been severely neglected, as were his adopted siblings, due in part to his parents' work schedules. Manuel took care of the children in the afternoons and evening. According to Peter's records, Manuel frequently picked up Peter from school and took him to Manuel's favorite bar. If Peter and the other children were not taken into the bar, then they were left in the car to wait until their father had finished his "business." This appeared to be the pattern regardless of whether it was summer or winter. Apparently at other times, Peter's father would leave him and the other children at home unsupervised. Records also indicate that Peter and his siblings were made to take care of their father when he was sick due to alcoholism. Peter appears to have been the "scapegoat of the family." While apparently all children were occasionally beaten, Peter appears to have been the primary target of severe physical abuse. Records indicate that Peter was subjected to humiliation as well as frequent battering by his adoptive father, Manuel. Manuel beat Peter with both his hands and other objects such as a belt. While the family history would seem to indicate the possibility of Peter's adoptive sisters being sexually abused by Manuel, Peter denies any sexual

contact with his father. Peter was further neglected by his mother due to her severe problems with mental illness and frequent hospitalizations. By this time Peter would frequently stay at a friend's house, sometimes for days at a time in order to avoid his father.

Peter found out that he was adopted when he was 12 years old as a result of taunting by one of his brothers. He then subsequently developed an "identity crisis." During Peter's teenage years, he lived with his biological mother, whom he had been raised to believe was his aunt. His biological mother, Carmen Hernandez, according to records, took advantage by putting him in a parental role and asking him to take care of her other children, as well as asking him for money. By Peter's mid teens he did not have a stable place of residence as he was avoiding his father, Manuel, and moving between friends and relatives' homes.

Peter reported that he began using alcohol when he was 10 years of age as well as marijuana. He stated that he had been smoking cigarettes since the age of 7. He reported that he was sold hallucinogens and marijuana when he was 10 years of age by friends of his older brother. He later discovered that his older brother was himself dealing drugs. By the age of 16, Peter had developed chronic difficulties with alcohol and drugs (hallucinogens and marijuana). He was staying out all night, frequently passing out outside, and being left in his parents' yard in the snow overnight. His difficulty with drugs and alcohol lead to several motor vehicle accidents in which he was injured physically as well as traumatized. Peter further suffered the loss of a close friend during a motorcycle accident. Peter reported continued use of alcohol and drugs until his incarceration in 1986. He does not report any other social activities other than hanging out with friends during this time period.

SCHOOL HISTORY:

School records indicate that Peter began to have difficulty with academics at his entrance into school. Peter reported that early on he had considerable difficulty with reading, spelling, and language. Peter quit school at the age of 16. He was at that time in the 9th grade. He reportedly dropped out due to bad grades and being caught with marijuana. A review of early school records indicates that he has consistently made poor grades.

Today, Peter is able to read at about the 12th grade reading level. However, he still may be considered functionally illiterate in spelling and arithmetic. He has done considerable study to help increase his academic skills so that he may be able to complete a GED. However, he reported that his tutoring while incarcerated has been inconsistent and incomplete. He appears to be highly motivated to complete his GED as well as anxious to complete his educational preparation.

HEALTH HISTORY:

Peter's records indicate that his biological mother suffered from alcohol dependency during her pregnancy and may have been drinking all the way up until his birth. Peter may suffer from Fetal Alcohol Syndrome. According to Peter's report and his records, Peter was involved in two car accidents at the age of 20. According to records, during the first auto accident Peter received a cervical fracture to the spine. In both of these accidents he received head injuries. A degree of post-concussive symptoms resultant from these head injuries is unclear. Presently, Peter reports being infested with parasites. He reported that parasites have infested his ear canals. He indicated that he has shaved much of his body including his scalp in order to rid the parasites. He reported that he has seen bite marks on his body and

suffers such symptoms as itching in his groin area. He also remarked that he is afraid that he will transmit these parasites to other inmates. He reported that he has requested to see a specialist, and that he has been treated. However, he indicated that each time he has been examined, no evidence of parasites was seen. He believes this to be incorrect, though. It is believed that Peter may be experiencing a paranoid delusion involving parasite infestation of his body. These "parasites" appear to resist treatment and to be undetectable during normal examinations. No other remarkable medical history was reported.

Peter reported that he has been smoking cigarettes since the age of 7. He reported that he began drinking alcohol and using marijuana at the age of 10. He reported a wide range of exposure to various substances including amphetamines, butyl nitrate, cocaine, codeine, LSD as well as other hallucinogens, hashish, heroin, opium, PCP, quaaludes, and valium. He reported that during his drug use, he experienced blackouts which were usually of short duration. He reported that when taking the hallucinogens, he had "trips." He further reported that he has had flashbacks when using drugs involving "bad times in his life as well as dreams." He indicated that these flashbacks seem to be abuse related. According to Peter, his flashbacks involved memories of being beaten by Manuel. He reported that he very seldom experiences these flashbacks now. Peter did not report any further medical concerns, and reported that he was not presently on any medications.

According to records from Sinnissippi Mental Health Center in Dixon, Illinois, Peter was seen for alcohol and drug problems in 1982 at the age of 16. He was seen another time in 1982 and was advised to enter a day rehabilitation program. However, it is apparent from his records that he never followed these recommendations. Peter apparently did attend some treatment there beginning in 1985 with

termination in 1986. Records indicate that Peter has been resistant to mental health treatment for his alcohol and drug use and that his termination from Sinnissippi Center was due to his having left the state to avoid criminal charges.

WORK HISTORY:

According to Peter, he has worked in an airport as airport security for a period of 3 months. Other jobs he has held are: at a Speedy Carwash, as a Mexican restaurant waiter, and in something called "Temporary Service" for a period of 2 years. He indicated that this job involved testing pipe. He stated that he liked the restaurant work best because he could meet a lot of "chicks." He also stated that the bartenders are usually "drugees" and readily help to support his habit by providing free drinks and/or leads for buying drugs.

According to records, after leaving school Peter worked for Ceta at outdoor jobs which he reportedly enjoyed. Following this, he worked for a cable television company as well as doing manual labor at a cemetery. Reportedly from the ages of 18 to 21, Peter roamed around the country finding work as he traveled. His travels took him from Arizona to Louisiana, as well as Indiana with stops in Illinois.

SOCIAL HISTORY:

Peter stated that he began dating at the age of 13. He reported normal sexual development, having had his first sexual experience about the age of 15. He indicated that this was with a girlfriend 5 years his senior, however. Peter has never married. He indicated that his only relationship in which he found love was with a girl named Tammy, just prior to his incarceration. During his incarceration at Ellis I, he has asked his family not to visit. Peter discussed several women who have come to visit him who have either been siblings or

mothers of other inmates. He stated that most of his visitors have wanted to talk to him about God. He reported that he prays regularly, but that he does not identify with any one religion even though he was raised Catholic. He stated that he has asked people to reduce their visits or to stop coming because he has felt pressured by them to commit to one religious persuasion or another. He reported that he has been writing to a young girl since 1988. He indicated that she is now 13. Apparently this girl is someone he met just prior to his being moved to Ellis I. She was the relative of another inmate. He reported that they are just friends.

CRIMINAL HISTORY:

Records indicate that Peter has previously been charged with drinking under age, a violation of probation, driving without a license, and aggravated battery. According to Whiteside County Jail records, Peter had been arrested previously for obstructing a police officer and illegal transportation of alcohol (liquor), retail theft, as well as various other contempt charges and violations of probation.

BEHAVIORAL OBSERVATIONS AND MENTAL STATUS:

Peter presented for the evaluation clean and well groomed. Peter was quiet and cooperative, and his mood and affect appeared to be appropriate to the testing situation. However, he did demonstrate some mild frustration due to the fact that our appointment had been delayed nearly 1 hour due to procedural problems at Ellis I. Peter spoke with a mild Hispanic accent, and appeared to be fairly fluent in English. He appeared to be mild mannered. Peter was able to understand test instructions and the tasks requested of him.

Peter is of average height and has a rather muscular build, although, he appeared slightly overweight. His gait and

gross motor movements appeared to be within normal limits. He appeared to be relaxed with the examiner, and eye contact was easily maintained. On the first day of testing, Peter appeared somewhat anxious about his test performance, fearing that he was doing poorly.

On the second day of testing, Peter became more anxious and frustrated as the end of the evaluation neared. This anxiety appears to have caused him some difficulty in being able to give a complete report to the examiner of his history. He became frustrated with the TAT. However, he appeared to be composed at the time that the examination was completed.

During testing, Peter worked diligently and did not tend to give up easily on tasks which became difficult. Peter was well oriented to person, place, and time. No unusual, bizarre thoughts were noted during the evaluation. However, in questioning him about his medical history, he reported "a parasite infestation," which seems to be of delusional qualities. Abstract reasoning was poor (he could not correctly interpret common proverbs). He demonstrated some difficulty with general memory functions. Both remote and recent memory appeared to be impaired. He had difficulty recalling his history as well as recalling general information. His immediate recall was impaired. He was able to recall seven digits forwards, but only two digits backwards on the Digit Span subtest of the WAIS-R.

TEST RESULTS:

With a chronological age of 31, Peter obtained a Verbal Scale IQ score of 83, a Performance Scale IQ score of 81, and a Full Scale IQ score of 80 on the WAIS-R. This latter score places his overall intellectual functioning at the lower limit of the Low Average range, and at the 9th percentile. Individual subtest scores are shown on the

attached summary sheet. This test is designed to measure global cognitive abilities. All Verbal Scale subtest scores that comprise the impairment index. Peter performed within the moderate impaired range on a task intended to measure abstract concept formation, reasoning, and flexibility of thinking. He demonstrated significantly impaired ability on tasks measuring the ability to recall the localization of objects in space using only kinesthetic cues (i.e., stimuli sensed by touch) as well as impairment in the discrimination of rhythms. His ability to perform simple sequencing tasks was within normal limits, but on a task involving complex sequencing and flexibility of thinking (i.e., moving back and forth from sequentially increasing numbers to letters), his score fell in the moderately brain impaired range. Fine motor (e.g., Finger Tapping) was measured within the moderately impaired range, although his grip strength was found to be within normal limits. Both tests indicated lower than expected performance with his right hand, suggesting anterior left hemisphere dysfunction.

On two instruments that are intended to be particularly sensitive to frontal lobe dysfunctioning (the anterior part of the brain which controls thinking, reasoning, judgment, and impulse control), Peter's performance fell within the moderate to severely impaired range. On the Judgment of Line Orientation test, he achieved a score of 22, indicating mild to moderate impairment. On the Wisconsin Card Sorting test, Peter had. 48 errors, but completed only two categories. He further had 35 perseverative errors. An individual without brain impairment and of Peter's chronological age could be expected to complete all six categories with significantly fewer errors. This data suggest that Peter has severe impairment in his ability to process complex information, perform abstract reasoning tasks, develop abstract concepts, and be flexible in thinking (i.e., ability to adapt thinking and reasoning to the situation). An average person without such impairment would be able to understand the consequences of

actions, solve problems in a logical and reasoned fashion, generalize thinking to new tasks or situations, change reasoning formats as needed when an approach is unsuccessful, and form ideas, concepts, and rules concerning the relationships among events, tasks, or situations.

Results of the Sensory Perceptual Exam were generally unremarkable except on the Fingertip Number Writing Test which revealed two suppressions of the right hand and two suppressions of the left hand. However, these scores are within normal limits and right/left differences were equal. These tests measure sensory abilities.

On the Reitan-Indiana Aphasia Screening Test, Peter achieved an error score of 1, suggesting difficulty with the enunciation of words (central dysarthria).

The Rey's Malingering Test was administered. Peter was able to reproduce four of the five lines correctly. This suggests a valid presentation of symptoms and no attempt to exaggerate or malinger on this test. This test is designed to detect clients who are attempting to exaggerate their problems.

On the MMPI, Peter obtained a valid profile. This is a standardized instrument for assessing personality and emotional functioning. It is likely this profile reflects this individual's current psychological state. Individuals with similar test results can have somewhat unusual thought patterns. This may be observable in subtle communication difficulties. Individuals with similar scores may be somewhat eccentric, may be unpredictable, and tends not to conform to customary norms. Anger may be acted out in bizarre ways. Peter's scores indicate that a thought disorder may be present. Paranoid traits may also be present. Individuals with this profile type typically report symptoms which include guilt, depression, low self-concept, and feelings of inadequacy.

Suicidal ideation should be monitored. Total distortion of the motives of other people is quite possible. A delusional belief system may be present. Peter may have difficulty with anxiety and tension. His anxiety-related symptoms may include phobias as well as obsessions. Peter's profile suggests a character disorder, a thought disorder, marked depression, paranoid traits, marked anxiety, and the probability of functional physical complaints. His profile also suggests, which is confirmed by his history, alcoholic benders, using drinking to cope with problems and concerns, as well as a potential for narcotics addiction.

Peter's performance on the Draw-A-Person and Draw-A-Family Projective Tests were similar to that found in individuals with organic brain damage. The overall clinical impression of his drawings was poor. His drawings were very immature and drawn in absolute profile with moderate distortions. 'His family drawings were of poor quality and demonstrated the same general characteristics of his DAP drawings. Analysis of his drawings would seem to indicate that withdrawal is one way of coping with the environment and stressors that Peter has learned. Aggressive thoughts and feelings may be present, but are uncomfortable and defended against with the repression and suppression. Fantasy appear to be a basic source of need satisfaction. Peter tends to feel inadequate and lacks overall motivation to achieve. He may demonstrate relative uneasiness over his fantasy life. His degree of anxiety may have a disruptive influence upon his perception of reality. There appears to be a relatively noticeable degree of immaturity and/or sexual fixation. An underlying organic condition may be present.

On the DES, a scale intended to measure the nature and severity of dissociative experiences, Peter achieved a score of 20, indicating mild dissociative symptoms. These results concur with his MMPI results, which further suggested

a propensity towards dissociation and memory blackouts. He may "lose time" and not be aware of his actions at times.

On the Trauma Symptom Checklist, Peter demonstrated significant difficulty with dissociation and sleep disturbance. Depression, anxiety, and some sexual problems were also noted. His total TSC score was 44, indicating mild to moderate trauma symptoms which may be associated with Post Traumatic Stress Disorder.

On the Thematic Apperception Test (a test designed to reveal personality conflicts and defense), Peter's responses tended to be adequate in quality. The responses he gave to the cards suggested severe difficulties in interpersonal relationships, especially with the opposite sex, and a traditional orientation towards family values. There appears to be disregard for the opinions and feelings of younger females. However, mother figures appear to be held in esteem. His responses demonstrated significant themes of anxiety, frustration, unresolved conflicts, as well as projection of his own childhood. One particular story he related involved a young boy who was poor and appeared to be suffering from some despair as well as boredom. Peter struggled with the idea of whether or not he was going to get in trouble because he was unsupervised (no one was even watching him) or whether he had already been in trouble and had been left there. Peter answered each card with a response rather quickly, and his responses were brief. He was unable to take each story to a conclusion.

For actual test scores from these batteries, please see the attached summary sheet and the Neuropsychological Deficit Scale summary. The latter indicated that overall brain impairment exists and that it is in the mild range.

DIAGNOSIS:

Based upon the testing results, interview, and background information, the following diagnosis, including the standard classification code number, were found.

ICD-9	854.0	Intracranial Brain Injury (due to closed head injuries and polysubstance abuse) - Mild to Moderate
	310.0	Frontal Lobe Syndrome
DSM-III-R	294.80	Organic Mental Disorder, NOS
	304.90	Polysubstance Dependence - In Remission
	315.80	Developmental Writing Disorder
	315.i0	Developmental Arithmetic Disorder
	309.89	Post Traumatic Stress Disorder (due to severe child abuse and abandonment)

SUMMARY:

Background data and the current test results indicate that Peter suffers from mild to moderate neuropsychological brain impairment with significant dysfunction in the frontal lobes. Although the pattern of test scores is consistent with the diffuse cerebral impairment, his frontal lobes appear to be somewhat more impaired. Damage to the frontal areas severely limit the individual's ability to think, reason, and control impulses. These severe limitations hinder Peter's ability to comprehend the consequences of his actions. In addition, he tends to act without thinking and does not appear to be able to appropriately judge situations or plan ahead.

Peter is apt to misinterpret events, is highly impulsive, and is likely to over-react in an irrational and often explosive manner due to a combination of his brain dysfunction and Post Traumatic Stress Disorder (PTSD) symptoms. PTSD is likely to produce extreme stress reactions, high arousal (i.e., hyperactive types of behavior), fears, reactivity to cues resembling the original trauma and outbursts of anger. Since Peter also has neuropsychological impairment, he is not able to control impulses or reason appropriately when under stress from the PTSD which exacerbates the situation and increases the likelihood of violence. Simultaneous polysubstance abuse magnifies the intensity of the actions and further reduces impulse control and inhibitions.

The results and background data indicate a high probability that Peter has neuropsychological impairment that is probably a result of his two closed head injuries as well as beatings to the face and head in childhood. Possibility of prenatal damage also exists since his mother was chemically dependent during the pregnancy. His disabilities have been exacerbated by parental neglect, abandonment, abuse, his many head injuries, and chronic long term substance abuse. any single one of these factors can produce significant dysfunction. Child neglect and abuse often lead to poor impulse control, poor frustration tolerance, and incapacitating personality functioning. Head injuries can frequently emulate similar dysfunction. Chronic drug abuse can also generally produce brain impairment. It is also possible that his Organic Mental Disorder is producing delusional thoughts, such as those stated earlier in this report.

Earlier psychological records appear to have focused primarily on Peter's treatment issues and counseling sessions. Therefore, they were extremely limited in scope and never addressed as neuropsychological impairment or PTSD.

Peter's current test results, background, and previous testing indicates that his conditions and impairment are chronic and that they are of long standing nature. Therefore, it is probable that they were present in 1986 when the crime for which he is currently incarcerated was committed.

Thank you for this consultation. Please feel free to contact us if additional information is desired.

Respectfully submitted,

s/ Robert Geffner
Robert Geffner, Ph.D., P.C., ABPN
Licensed Psychologist
Diplomate Clinical Neuropsychology

s/ Ron Roberts
Ron Roberts, M.S.
Counselor

AFFIDAVIT OF MARIA JUANA MINIEL

STATE OF ILLINOIS)
) ss.
COUNTY OF WHITESIDE)

Maria Juana Miniel, upon being duly sworn, deposes and states:

1. I have personal knowledge of the facts set forth in this affidavit and could, if called as a witness, competently testify thereto.

2. I am the fourth child of Jessie and Manuel Miniel. Peter Miniel is my adopted brother. I am 33 years old and was born on October 28, 1959, and I am three years older than my brother, Peter. In addition to Peter, I have five other siblings. In descending order of age, they are Guadelupe, Maria Secoro, Santiago, Juan Filippe, and Maria Marguerita.

3. When I was very young, my family lived in a house in Rock Falls, Illinois not far from the house where my parents now live. My father, Manuel, built the house that we lived in for most of the time when we were growing up, and my parents still live there today.

4. During the time that I was growing up, my father worked as a crane mechanic at Northwestern Wire & Steel, which is a factory in Sterling, Illinois. My mother, Jessie, worked at Lawrence Brothers, which is also a factory in Sterling, Illinois. My father usually worked during the day. My mother worked on the night shift. She began work at three o'clock p.m. and worked until midnight. Therefore, when we were children, we spent a great deal of time with our father.

5. Peter is the only adopted child in our family. Peter's natural mother is my mother's half-sister, Carmen Hernandez. Carmen was much younger than my mother. When Carmen became pregnant with Peter, she decided that she did not want to keep him. She had decided to divorce Peter's father, and she already had two children--Veronica Hernandez and Mike Hernandez. Only Veronica is Peter's full sibling. I do not remember how my parents decided to adopt Peter because I was very young at the time, but I do remember that he joined our family when he was just a little baby.

6. Carmen, Veronica, and Mike are all alcoholics, and they have been as long as I can remember. Because I was so young when Peter joined our family, I do not remember whether Carmen was drinking when she was pregnant with Peter, but it would not surprise me to find out that she was drinking at that time.

7. My father is an alcoholic, as am I and my sister Margaret. I also believe that Peter is an alcoholic, as are most of my other siblings. Because my father was an alcoholic, it was very difficult for me and my brothers and sisters when we were children, but it was especially hard for Peter. I always thought that my father hated Peter. He treated Peter much worse than me or my other brothers and sisters. I do not know why. It may have been because Peter was adopted, and my father resented having to support Peter. It may also have been that my father did not want to adopt Peter at all. I believe that my mother loved Peter very much and wanted to adopt him but that my father would rather not have adopted Peter.

8. When we were children, Peter quickly assumed the role of scapegoat in the family. Whenever anything got lost or broken, it was always Peter who was blamed for it, even if he obviously was not at fault. This was especially true

when money or something else of value was missing. I remember one time when Peter's brothers were playing football in the house, and they broke one of my mother's ceramic saints. Peter was not playing with them, but he got blamed for it anyway. My father always punished Peter at these times. He would either just smack Peter once or beat Peter for a very long time. I was always very afraid for Peter because I did not know what my father would do to Peter. My mother thought that my father treated Peter differently from the rest of us too, and she did not approve of the way that my father treated Peter. She was at work during most of the time that me and my siblings were alone with my father, and she did not know how bad it really was for Peter.

9. Peter and I were very close when we were children, and we continue to be close today. We used to stick up for each other in school when the other children picked on us. I remember that there were children in our school that were snobs, and they looked down their noses at me and Peter and our brothers and sisters. The snobs put us down all of the time. Peter was proud and did not like the way that the snobs treated us. He would talk back to them and end up in trouble with the teachers.

10. When Peter was in grade school, he was in the boy scouts. He also took boxing at the YMCA, and he took Tai Kwan Do classes with Margaret. Peter did not stay in boy scouts for very long, but he really enjoyed boxing.

11. When we were children, my father always carried a knife. Peter and I thought that this was really cool, and so we carried knives all of the time too. We used to play "chicken" in the front yard. One of us would spread our feet apart, and the other would try to throw the knife between the other's feet.

12. My father's alcoholism had a tremendous effect on us when we were children. When we got to be a little older and our father did not come home, my brothers would go out to look for him. They always found him at the tavern next to the park in Rock Falls. I remember that we used to play in this park when we were little children and my father was drinking in the tavern. Sookie would baby sit us, since she was the oldest, while our father was drinking. We had to go to the tavern to use the bathroom, and we would beg our father to take us home when it started to get late. To keep us quiet, he would buy us soda and chips.

13. Sometimes, my father even took us to the tavern with him when he drank. This happened when we were still in grade school or junior high school. He made us wait in the car while he went into the tavern to drink no matter how hot or cold it was. Right before it was time for my mother to come home from work, my father would take us home. He told us to get in bed and pretend like we had been at home all night long.

14. Peter, Margaret, and I often had to take care of my father when he came home drunk. He would come in and lie on the couch and demand that one of us bring him a cool washcloth and a bucket to throw up in. Usually Peter or I had to take care of my father. My father was very mean to us at these times. He expected us to jump to get what he asked for, and he got very angry with us when we did not do exactly what he wanted. Even though my father was very hard on all of us, he was especially mean to Peter. If Peter did not do exactly what my father wanted, exactly how my father wanted, my father would yell at him, smack him, or beat him very badly.I know that Peter was only trying to do what my father wanted.

15. I remember one time when Peter got beaten really badly by my father. My father came home from work very

drunk. John told my father that Peter had hurt his feelings. My father became enraged and jumped on top of Peter. He pinned Peter's arms to the floor by kneeling on them. He then started hitting Peter across the face over and over again until Peter's face was covered with blood. Peter was only about 10 years old at this time. I finally yelled out for my father to stop. I thought he was going to kill Peter. I have never seen anyone else be beaten like this. My father finally did stop. He then told Peter to go clean up his face so that my mother would not find out that he had been beaten. There was no hiding this beating though. Peter's face was swollen and black and blue even with the blood washed off.

16. My father did not want us to tell my mother about his beating Peter like that. When my mother came home, she and my father got into a big fight about the beating that Peter got. My father told my mother that Peter was her baby and that she spoiled him. I do not think that my parents have ever resolved the way that my father treated Peter. My father never beat the other children in my family like he beat Peter. In fact, he only smacked me once.

17. I remember that my father used to have a lot of blackouts when he was drinking, which was all of the time. When he came home, he would pass out on the couch. In the morning, he would not remember what he was doing sleeping on the couch.

18. Everyone in my family always knew that Peter was adopted, but we kept this from Peter. However, Peter found out that he was adopted when he was about 12 years old. James was angry with Peter. In order to hurt Peter, James told him that he was adopted that "the family did not really care" about him because of it. After Peter found out that he was adopted, the other children in our family used this to taunt him. It was very hard for Peter once he found out that he was adopted. My brothers and sisters teased him and

said that he was not really wanted. Veronica and Mike were especially hard on Peter in this respect.

19. When Peter found out that he was adopted, he took it really hard. His personality really changed after this. Before I think that he still felt like he was part of the family, but after he found out, he did not feel like he was part of the family. He did not think that he was loved or wanted by our family. At this time, he started to rebel against our family, and he began to be very protective about Carmen's family.

20. I remember one time, Peter and I were having an argument when we were driving to the mall with our mother. Peter was angry with me and started calling me, "bitch," "slut," and "whore." I got very angry because I was not any of these things. I told him that Veronica was the slut. She was only 14 years old at the time, and she already had a baby girl and was pregnant again. When I said this, Peter blew up. I asked my mother to let me out of the car. She did, and I was then mad at her because I felt like my mother was taking Veronica's side over her own flesh and blood.

21. I did not like the way that Carmen's family treated Peter either. I felt like Carmen did not care for Peter at all, and as he got older, she only wanted him around when he had money.

22. After Peter found out that he was adopted, he started drinking very heavily. I was already drinking pretty heavily at this time. I would go to the tavern where my father hung out. My father did not want us to drink, and he did not like for me to go to the bar. I would sit at one end of the bar and drink, and my father would sit at the other end of the bar. He never said anything to me or looked my way, but I knew that he knew that I was there. We both got smashed. My father did not approve of my drinking or my other sibling's drinking, but he really did not do anything about it.

23. When Peter started drinking, however, my father treated him entirely different. He would lock Peter out of the house so that when Peter came home he would not be able to get in. Sometimes, when my father was asleep, my mother or Margaret or I would let him in. If my father found out that we let Peter in, he would get very angry. I felt like my father just wanted to punish Peter for everything.

24. Around this time, Peter was going out drinking every night. Peter started hanging out a lot with Veronica and Mike a lot. They also hung around with Veronica and Mike's younger siblings--Freddy, Francisco, and Nacho. Veronica, Mike, Freddy, Francisco, and Nacho were a bad influence on Peter. They were already drinking very heavily at this time. They also started a lot of fights. Carmen's children got into trouble for disorderly conduct, battery, and consumption of alcohol as minors. Usually the batteries involved trouble between boyfriends and girlfriends. I did not want Peter to hang around with his cousins. Peter and I were and are very peaceful, even when we are drunk, but Veronica and Mike and their siblings were not. Mike would start fights. He also urged Peter to get into fights.

25. I know that Peter was very peaceful. He was very protective of my family. When Sookie was about 19 years old, she married a black man. I was married at the time, and my husband did not like the fact that Sookie had married a black man because he was a racist. He used to taunt me and call me a "nigger lover." This made Peter very angry, but he never touched my husband. I did not want Peter to get involved in my problems either. I was afraid that he would get hurt or killed or end up in jail.

26. I believe that Peter was an alcoholic at this time. He drank so much that he would black out. He would go out with his friends, and at the end of the night, they would just

drop him off in the yard of our house. He would not remember how he got home or what he had been doing or even who he was. One time, we found him passed out in the snow in the backyard. He was very cold and must have been there for a while. We dragged him into the house and called the ambulance.

27. My brother, James, was also very hard on Peter. James moved to Indiana when he was about 17 or 18 years old, where he married his wife. We were all visiting once when Peter was a teenager. James found out that Peter had been drinking a lot, and James began beating Peter really bad. I stopped this beating too. My mother was very upset by this, and we all returned home before our visit was over.

28. I and all of my siblings have tried to commit suicide at least once. I believe that Peter tried to commit suicide twice. The first time that he tried suicide, he did it by overdosing on alcohol. He drank Mad Dog, Jack Daniels, and Tequila. On this night, he was taken to Community General Hospital, and his stomach was pumped. I went to visit him in the hospital. He was very, very depressed. The second time that Peter tried to commit suicide was harder. Peter was about 18 years old at the time. He came home one night really drunk, and he had an argument with my mother and father. My father called his sponsor from Alcoholics Anonymous ("AA"), Leo. He then came over with his wife. Peter and my father were wrestling on the floor in the living room. Peter then went to the kitchen and got a knife, and threatened to kill himself. Leo's wife said, "well if he wants to kill himself, just let him do it." Someone got the knife away from Peter. Peter then ran out of the house, and my father called the police. I followed Peter. We talked. He told me that he was very depressed and that our father just did not want him in the house. I know that Peter was really hurting about his relationship with my father.

29. My older brother Guadelupe tried to commit suicide shortly after he got married. My family and I went over to his apartment, and we found him with his head in the oven and the gas turned on. Guadelupe was taken to Community General Hospital.

30. Right before Sookie graduated from high school, she tried to commit suicide while at a friend's house. She locked herself in the bathroom and slit her wrists. Her boyfriend found her. Sookie was put in Community General Hospital because of this suicide attempt. Prior to this incident, Sookie had taken an overdose of pills. She was hospitalized at Community General for this suicide attempt as well.

31. John tried to commit suicide when he was in high school too. John left a tape recorded suicide note and then took an overdose of pills. My mother found John and took him to Community General.

32. James tried to commit suicide once when I was visiting him and his wife in Indiana. He was in the bedroom and had a gun. He kept saying that he was going to kill himself. As I walked by the bedroom door, the gun went off, and I could feel the bullet pass through the air right in front of my face. James was not trying to hurt me at the time. He was trying to kill himself.

33. Margaret tried to kill herself a couple of times by taking an overdose of pills, and she tried to kill herself by slitting her wrists. Margaret was taken to Community General for her suicide attempts.

34. I tried to commit suicide after Peter was arrested at my apartment in Chicago. I had returned to Rock Falls, Illinois from Chicago and was living with my boyfriend, Francisco. I was very depressed and had been drinking. I got into an argument with my parents because I believed that they

were trying to take my children from me. I took an overdose of pills. I was taken to Community General, and I had my stomach pumped there. My father had me committed, and I was taken to KSB in Dixon, Illinois, where I was kept locked up for a few months.

35. I was hospitalized a short time after my first suicide attempt. I had been drinking and had gotten into a fight with Francisco. I went to Community General on my own this time. I was kept there for a few days and released.

36. Peter knew about all of these suicide attempts.

37. When I was a sophomore in high school, I dropped out and went to live with my aunt, Isabel Gonzales. At this time, I started working at a nursing home, and I worked there for about a year and a half. I started working for Cable Printing. Peter dropped out of school when he was about 14 years old, and I got him a job at Cable Printing. He worked as a roto stacker. A roto stacker gets the paper into a neat pile when it comes off of the press. The machine would jiggle the paper while the stacker hit the sides of the stack of paper with his or her forearms. Cable Printing gave us these sleeves to wear on our forearms to prevent us from getting paper cuts. Peter refused to wear these protective sleeves. Peter was trying to prove that he was a man, and because of this, his forearms were constantly covered with paper cuts.

38. When Peter started dating, he also treated his girlfriends with respect. A lot of guys would call their girlfriends "bitch" or "slut," but Peter never did this. Peter's first serious girlfriend was Donna Wade. He started dating Donna when he was about 15 years old. Donna had a little boy at that time.

39. One time I got into an argument with Peter about Donna's boy. It was very rare that I criticized Peter. Peter and

Donna would go out drinking all night and sleep all day. Donna's little boy would not be able to wait to go to the bathroom this long and would dirty his pants. Peter got very angry about this and would spank the boy. Peter never beat Donna's boy, but I thought that it was not right to spank the boy for this. After all, it was Peter and Donna's fault for staying out so late. I do not remember Peter being beaten for dirtying his pants when he was really little, but I would not be surprised if this happened to Peter.

40. Peter always felt really bad about spanking Donna's boy. He would take the boy out the park after a spanking and push him on the swing set. Peter loved children and always got along well with his girlfriends' children.

41. Shortly after Peter stopped dating Donna, he started dating Theresa Jacobs ("Teri"). Teri also had a little boy.

42. When Peter was a teenager, he got into a couple of accidents that had a big effect on him. The first time, he was in a car accident. He was driving with some friends and they hit a light pole. Peter was sitting in the front seat of the car and his head hit the windshield. His face was really banged up. It looked like someone dragged him across gravel.

43. The second accident was much harder on Peter. He and some friends were riding motorcycles at night. Peter and a friend were riding on one motorcycle and two brothers, Randy and Gary Griffith, were riding on the other motorcycle. They came up on a railroad crossing that was not marked with lights or a gate. Peter and the guy that he was with were able to stop, but Randy and Gary hit the train that was passing by Randy was killed in the accident.

44. Peter took Randy's death really hard. I could tell that he had cried, but Peter never cried in front of anyone. After the accident, Peter starting drinking even more.

45. I married my first husband when I was very young. When we got married, I stopped drinking for a little while. But when I stopped, my husband started drinking really heavily. He would stay out late every night and come home drunk with six of his friends. He expected me to get out of bed and cook for them. When he came home drunk, he would also throw food all over the floor. One time, when he was drunk, he picked up a pan full of hot grease and poured it over my head. I did not want anyone to find out about it so I did not go to the hospital, but all of my hair fell out, and I had red burn marks all down my face. Peter was very worried about me and asked me about the burns. I told him that I had a cooking accident.

46. One time I decided to leave Matias D. Hernandez when he hurt my son, Noe Thomas Hernandez. I was taking a bath, and when I came out of the bathroom, I saw that Matias D Hernandez had pushed Noe down the stairs at our apartment. When Matias D. Hernandez went out, I packed all of our belongings and went with Noe and my daughter, Emery Hernandez, to my Aunt Isabel's house. My family urged me and Matias D. Hernandez to get back together and we eventually did.

47. Matias D. Hernandez, Noe,. Emery, and I moved to Los Angeles shortly after this. I was on AFDC at this time, and Matias D. Hernandez did not work. I was working though for Matias D. Hernandez aunt, who had a Mexican lunch truck. I worked 18 hours a day, and my husband spent all of the money that I earned and my AFDC money on alcohol. My husband moved out. However, he then got really jealous and came to my apartment one night when I was coming home from work. He pulled me out of my truck with

the engine still running and started to beat me over and over. I told him to stop because I was pregnant, but he would not stop. My husband's cousins had to pull him off of me.

48. I returned to Rock Falls after Matias D. Hernandez beat me up, and I started living with my parents. At this time, I met my second husband, Guadelupe Trujillo. He was renting the basement of my parent's house. I started drinking a lot at this time again. Guadelupe got a job in Chicago, and we moved there.

49. It was while Guadelupe and I were living in Chicago that Peter was arrested there. Peter arrived at my apartment about three to four days prior to his arrest.

50. The police arrived to arrest Peter very late one night in May of 1986. I heard a knock at the door. I went to the door to answer it, and I asked who was there. A man said that they were the police and that they were looking for a man. They told me the name of the person that they were looking for. It was a Mexican name that I did not recognize. I told them that they had the wrong apartment. They insisted that my apartment was the right one. I had been robbed the week before the police arrived, and I was afraid that the man at the door might also be a robber. I then asked him how I was to know that he was with the police. He told me to call the Cook County police station to confirm that they were the police. The officer at the door gave me the number to call. I called the police station, and they confirmed that the police were supposed to be at my apartment. No sooner than I unlocked the door the policed forced me back and entered my apartment.

51. I went to answer the door after making this telephone call. At the time that I answered the door, I did not know where Peter was. When I went to the door, the police burst in before I could get the door open. I remember that

there were two female detectives and two male detectives and a bunch of uniformed officers. They pushed me back up against the wall and asked where Pete was.

52. From where I was standing, I could see into the bathroom. I then realized that Peter was in the bathroom because I could see his reflection in the bathroom mirror. He was standing on the toilet. I also saw that my little girl, Maria Concepcion, had wandered into the bathroom too and that she was standing next to Peter. I was terrified for my little girl, and I ran toward the bathroom. I was afraid that the police would end up shooting her or Peter. When I ran to the bathroom, I told Peter, "I don't know what is going on," grabbed my daughter and said "please" to Peter. He lowered the gun, the police then grabbed the gun as and took us all out of the bathroom. They also grabbed Peter and pushed him down on the dining room table. They handcuffed his hands behind his back. They then dragged Peter to the door, although he was not resisting at all. I did not see what happened after they went through my front door, but it sounded like the police threw Peter down the stairs. The police would not let me follow Peter out of the apartment.

53. When the police dragged Peter out of my apartment, he was only wearing a pair of cut-off sweatpants. He did not even have a pair of shoes on. It was cold that night in Chicago.

54. After the police took Peter, they searched my apartment and took all of Peter's belongings that he had in the apartment. They never showed me a search warrant or an arrest warrant. In addition, the police did not tell Peter what his rights were while they were in the apartment. They did not tell him that he had a right to be represented by an attorney. They did not tell him that he had a right to remain silent. They did not tell him that anything he said could be used against him in a court.

55. Peter was held in the Cook County Jail for about six months after his arrest. I went to visit him as often as I could there. The first time that I went to visit was the day after his arrest. They told me that I could not see him that day because it was not his day for visitors. I returned the next day. They did let me see him that time. His face was black and blue with bruises and swollen. I asked him what happened, and he told me that he had gotten into a fight at the jail on his first night there. I did not believe him.

56. I did not come to Houston, Texas for Peter's trial. My sister, Margaret, and my parents went down to Texas for one month. They stayed in Houston for about one month.

57. Peter's lawyers, Fred Heacock and Al Thomas, never tried to contact me either before, during, or after Peter's trial. I did call Mr. Heacock's office at least three times before the trial. I left messages every time, but he never returned my telephone calls. I called Mr. Heacock because I wanted to help in any way that I could, and I wanted to know how Peter was doing.

58. Since Peter has been in jail, we have kept in close contact through letters. My mother buys Peter gifts when she can afford it. She also sends Peter money when she can. My father does not approve of my mother sending Peter money.

60. Attached as Exhibit A are true and correct copies of letters I received from Peter.

FURTHER THE AFFIANT SAYETH NOT.

s/ Maria Juana Miniel
Maria Juana Miniel

Sworn to and subscribed before
me this 24th day of May, 1993

s/ Diana S. Utnage
Notary Public, State of Illinois

AFFIDAVIT OF MARY MARGARET MINIEL

STATE OF ILLINOIS)
) ss.
COUNTY OF WHITESIDE)

Mary Margaret Miniel, upon being sworn, states as follows:

1. I have firsthand knowledge of the matters stated in this affidavit and could, if called as a witness, competently testify thereto.

2. I am the youngest daughter of Jessie and Manuel Miniel. I am 28 years old now, almost three years younger than Peter.

3. Peter's natural mother, Carmen Hernandez, gave Peter to my mother and father for adoption when he was just a little baby, so I remember him living with us since I was little I always knew that Peter was adopted and my brother and sisters knew too. I think I found out that Peter was adopted even before Peter did.

4. Dad was an alcoholic and seemed like he was always drinking. Dad used to pick on Peter and hit him and this was especially true when Dad was drunk. I would get scared when Dad would beat Peter because I was afraid that he would kill Peter. I don't think Dad ever beat the other kids like he did Peter. He certainly never did that to me. I think Dad treated Peter differently because he wasn't Dad's "real son."

5. The first time I remember Dad beating Peter was when he beat him with a belt that our sister, Sookie, used in colorguard. It was a really heavy belt that held a colorguard flag, and it had a cup in the front, where the flagpole would

rest made out of something like heavy rope. Peter tried to get away, but Dad caught him and beat him over and over. Dad hit him everywhere -- on his legs, on his arms, on his back. Dad was beating Peter so bad that our sister, Juana, finally had to stop him. I think that if Juana hadn't stopped him, Dad would've killed Peter. Peter was pretty small when this happened. I saw it happening when I walked out of my bedroom. When Dad saw me, he sent me back into my bedroom.

6. I know that the beatings really hurt Peter, but he would always try to hold it in and not cry. But sometimes it was so bad that Peter would cry and scream.

7. Dad would always blame Peter for anything that went wrong. For example, I remember one time when Peter and John Phillip were playing with matches in the bedroom and a curtain caught on fire. Both my Mom and Dad got called to come home. Peter got in trouble for the fire, and John Phillip didn't, but I know that Dad wasn't able to beat Peter the way he wanted to that night because Mom was there. Another time some kids were playing in the back and one of Mom's statutes of a saint got broken and Peter got blamed -- even though he wasn't even there.

8. Mom would try to protect Peter, and she and Dad would fight about the way Dad was treating Peter. She would always notice if Peter had any bruises or cuts, so Peter would wear long pants to try to cover up the marks to keep Mom from finding out. If Mom found out and got mad at Dad, it would be all the worse for Peter the next time.

9. Mom and Dad used to fight a lot, not only about Peter, but also about his drinking and seeing other women. One time Mom and Dad were fighting, and Dad broke an ashtray by slamming it on a table, and he cut his hand. Someone called a priest to come, but when the priest got

there, Dad told him that it was none of his business and that he'd better leave before he got hurt.

10. Another time Mom, and Dad had a fight about his drinking, and she left him to go visit her father in Texas. She was afraid to leave me at home with Dad, so she took me with her.

11. Peter started drinking and smoking pot when he was in seventh or eighth grade. He used to come home drunk late at night, and Mom would get up and make him something to eat. This would make Dad mad.

12. When I was in junior high, Peter would go out almost every night and get drunk with his friends. They would bring him back unconscious and just dump him on the porch. Then they would knock on the door and leave.

13. When Peter was still living at home, one of his best friends, Randy Griffith, got killed in a motorcycle wreck. He was with Peter when it happened. Peter was very upset for quite a while afterward.

14. When I was in high school, I tried to kill myself by taking an overdose of pills. My cousin, Veronica Hernandez, found me, and I was taken to Community General Hospital in Sterling to have my stomach pumped. I tried to kill myself again in 1986 or 1987 by slitting my wrists.

15. Other members of my family also tried to kill themselves. My sister, Sookie, slit her wrists when she was over at a friend's house. My brother, John Phillip, took an overdose of pills. My brother, Guadalupe, put his head in an oven and turned on the gas. My Dad's brother hung himself before any of us kids were born.

16. Peter moved away from home for good sometime around 1984 or 1985 and went to Houston.

17. Peter was arrested in Chicago and Mom, Dad, Sookie and I went to visit him in jail there. We also went to the court when they had the extradition hearing.

18. After Peter was taken down to Houston, Mom, Dad, and I went down. My oldest son, Marieo, was three months old at the time and went with us. I was also pregnant with my second son then.

19. We were in Houston for about a month. During that time we stayed at the house of a lady named Rosa Hunt, who met Peter when he was in the Harris County Jail.

20. We were in Houston when they were picking the jury for Peter's trial. Peter's lawyer, Mr. Heacock, met us at the courthouse one day and told us that they were picking the jury and that it was almost done. Mr. Heacock never asked us any questions about Peter, how long we were going to be in town, or whether we would be witnesses at the trial. We came back to Illinois before the trial started.

21. While we were in Houston, Rosa Hunt was very nice to us. She let us stay in her house as long as we liked. She made sure that we had food to eat, and she visited Peter in jail.

22. Attached hereto as Exhibit A are true and correct copies of letters I received from Peter Miniel.

s/ Mary Margaret Miniel
Mary Margaret Miniel

Subscribed and sworn to before me
this 25th day of, May, 1993.

s/ Cindy Foltzewiez
Notary Public
3197u

STATE OF ILLINOIS)
) ss
COUNTY OF WHITESIDE)

AFFIDAMIT OF JOHN P. MINIEL

John P. Miniel, upon being sworn, states as follows:

1. I am Peter Miniel's brother. I have personal knowledge of the facts set forth in this affidavit and could, if called as a witness, competently testify thereto.

2. Peter and I and our other brothers and sisters did not have the happiest childhood. My dad was an alcoholic and got drunk a lot when we were growing up. I do not think I ever saw my dad sober from about the time I was ten years .old until I was about 16. When dad would come home drunk, we would all stay quiet until he fell asleep. He would call us to bring him a bucket and washcloth. My mom drank too, although not as much, but I do remember her partying and trying to keep up with my dad.

3. My dad was harder on Peter than on the rest of us kids. I remember a time that Peter was really bruised and stayed home from school, but I do not remember how this happened. I was outside with Peter when my dad told him to get in the house. I think Mary Jane was inside. I did not see anything happen, but I remember that everything was kept hush-hush, and I had wondered what was going on. Peter stayed out of school for about a week.

4. Peter and I were raised as twins until Peter found out he was adopted. I remember Peter was really hurt when he found out. I think he felt like a person with no direct ties -- like he had just been sold off or something. Peter and I never got along when we were younger. During the last three years or so that Peter was living in Illinois, he and I started to grow

closer together. The name calling stopped and we had more respect for each other. During this time Peter and I were working together doing seasonal work at Galrapps turkey farm. I would pick Peter up in the mornings and we would drive to work together. Even when we were getting along, Peter and I never really talked about things other than just small-talk.

5. While I was in high school I created a suicide hotline. This was after a couple of my friends had killed themselves, and I wanted to do something to stop this from continuing with other people I knew. After I graduated from high school I attended some classes at the Morrison Institute of Technology. I was employed in the mental health field for over fifteen years. I worked at the Dixon Developmental Center, St. Mary's Square Living Center, and Sinnissippi Hospital. I lost my job at Sinnissippi. Even before this happened though, I had gotten so burnt out with the work and tired of dealing with people's problems, that I had stopped talking to my family, and anyone else, and I decided then to get out of the field. I have been working at Products Unlimited since, Jan, 14 1993.

6. The first time Peter left Illinois, I was still in high school. I never paid much attention to Peter's activities -- he was always moving in and out of the house. I remember coming home one day and seeing Peter with one side of his face all tore up. His face was swollen, as if he had been hit by a brick, and he looked deformed. He had been riding with Rueben Garza and a couple other kids and they got in a car accident. Peter flew out the passenger side of the car and hit the ground. He had been sent home from the hospital because he did not have any insurance. My dad got mad because I called him at work to tell him about it. The very next weekend Peter went to Clinton, Iowa, with some friends. Oscar Canis was the one driving. They got in an accident, and Peter got the other side of his face all ripped up.

7. There was another accident that had a big effect on Peter. A good friend of his, one of the Griffiths, was killed in a motorcycle accident. Peter dealt with this the way he dealt with other things; he kept it inside himself. He was always too proud to cry. Not that he did not cry, it was just when he got caught he would deny it. I used to try to get Peter to talk to people about his problems, but he was always too private and proud. I could not talk to him or help him.

8. All of us kids used to drink a lot. Drinking no longer affects my life, but my sisters Margaret and Mary Jane still drink to the point that their lives are very unstable. I remember seeing Sookie with bandages on her arms when I was young. I did not know what was going on then, but as I got older I knew about the suicide attempts of my other brothers and sisters. I also attempted suicide. We were all just frustrated, unhappy, and broken-hearted. The reason I tried to kill myself was because I was miserable and wanted out. That time I finally listened to myself and did what I wanted to do. I was the only one who really meant to do it. The others always left themselves a way out; Mary Jane took an overdose and then called our mom, and James tried to shoot himself and missed. I think if a person really wanted to shoot himself they would not miss. I did not want to be found at home but had no other place to go, so I made sure that everyone would be gone when I did it. Everyone left to go to Dixon to visit Sookie for the day. I never say goodbye but I said goodbye to them that day. As soon as they left I took the pills. My mom had forgotten a pan she had needed to cook with and she came back to the house forty-five minutes later and found me.

9. Peter would always stand up for the family to defend the family's honor. We were raised to be fighters. Because Peter had the reputation of a tough guy, he was always being challenged. But I never saw Peter provoke a fight. I heard that what happened between Peter and his

girlfriend, Teri, was that they were arguing and fighting, and that Teri grabbed the bat and hit Peter with it, and he grabbed it away from her and was holding it when the police arrived. Teri was a fighter, the type of girl that would give Peter a fight. But in our town, if a person had a reputation, such as Peter, the police officers did not like you. What probably happened when the police showed up at Teri's apartment was that the officers just jumped to conclusions about what was going on and assumed that Peter had used the bat on Teri.

10. I remember talking to Peter before he left for Texas. He just told me he was moving, and that he thought a new environment would do him good. It was mostly just small talk between him and I, like always.

11. I remember going with my dad to the Whiteside County jail once to get Peter out. My dad asked at the police station for some help for Peter, but they told him that Peter had to do something more serious before they would do anything. After Peter was arrested in Chicago, my dad was angry. I think my dad feels like he failed with Peter.

12. Peter's lawyers, Fred Heacock and Al Thomas, never tried to contact me. I did talk to Peter's second lawyer, Mr. Rodriguez. Peter had been having a skin rash, and no one would do anything about it, so I called Mr. Rodriguez to try to get something done. I also called all kinds of organizations in Texas to try to get something done. Peter did finally end up getting treatment.

13. Since Peter's been in prison, he has written to mom often. She never learned how to read, so Mary Jane reads them to her. Sometimes the things that are in the letters are upsetting for mom and I don't think it's right for Mary Jane to be reading those things to her. I believe that some things just do not need to be discussed.

14. Attached hereto are true and correct copies of letters I received from Peter.

FURTHER THE AFFIANT SAYETH NOT.

s/ John P. Miniel
John P. Miniel

Sworn to and subscribed before me
This 19th day of June, 1993.

s/ Harry D. Ulfeta
Notary Public
3404n

AFFIDAVIT OF MARIA SECORO LeBLANC

STATE OF ILLINOIS)
) ss.
COUNTY OF WHITESIDE)

Maria Secoro LeBlanc, upon being sworn, states as follows:

1. I have firsthand knowledge of the matters stated in this affidavit and could, if called as a witness, competently testify thereto.

2. I am the oldest daughter of Jessie and Manuel Miniel. I have an older brother, Guadalupe, and three younger brothers and two younger sisters, James, Maria Juana, John Phillip, Peter, and Maria Marguerita. My friends and family call me Sookie.

3. I am six and a half years older than Peter. My mother and father adopted Peter, and he came to live with us when he was just a little baby.

4. Peter is just a few months older than my brother, John Phillip. When Peter and John Phillip were babies, I used to babysit them, take them for walks in the stroller, and change their diapers.

5. I am not sure how old Peter was when he found out he was adopted, but I think he was pretty young -- probably in grade school. I remember that, after he found out, Peter would sometimes call Carmen Hernandez, his natural mother, "Mom," too. This would hurt me because I didn't think it was right that our mother raised Peter, and Carmen gave him up, but he called Carmen "Mom."

6. My brothers and sisters and I had very unhappy childhoods. Dad was an alcoholic and was drinking all of the time. Mom went to work at 3:00 in the afternoon, and Dad would pick us up at school after he got off work. Down the street from the school was a tavern called the Palo Club, where Dad would stop. He would leave us kids in the car and go in to drink. After a few hours, one of us would go in and beg him to take us home. We would be tired and hungry. He would just buy us some greasy hamburgers and potato chips to eat and warm soda to drink, and he would go right on drinking. We would do our homework in the car and fall asleep in the car. Finally, he would come running out of the tavern at about twenty minutes to twelve and we would rush home so that we would get home before Mom did.

7. We had a lot of letdowns when we were kids because of Dad's drinking. I remember one time when we had planned for days to have this big family picnic, with our family and my aunts, uncles, and cousins. Dad got up early Sunday morning to go save us some tables, and he was supposed to call when he got there. But he didn't call. My aunts and uncles kept calling our house to find out when and where we were going to get together, and we could only tell them that we hadn't heard from Dad. We didn't hear from him until after midnight, when he came home drunk. We didn't get our picnic.

8. I don't have any happy memories of our home life when I was growing up. I remember that I was happy when I got to be a cheerleader in eighth grade, but I can't remember anything good about being at home with my family. When we were young, both of our parents would tell us kids that we would never amount to anything. I couldn't understand then why they would say this to me. I was in color guard and cheerleading, and I did pretty well in school. But they never seemed to notice when I did anything good.

9. I tried to commit suicide when I was 19 or 20. I was living at home at the time, and I was over at a friend's house. I was drinking and got pretty drunk. I went into the bathroom, locked the door and cut my wrist with a razor blade. I don't know who found me but I woke up in Community General Hospital in Sterling, Illinois, with my wrist bandaged up. I was in the hospital for about a week. The people at the hospital wanted to make an appointment for me to see a psychiatrist to talk about what had happened, but I didn't want to. I didn't think I needed to talk about it because I knew why I'd done it. It was because I had a horrible home life.

10. We all had an unhappy childhood, but it was hardest of all for Peter. I remember many times when Dad would come home drunk and lay down on the couch. Then he would yell for Peter to get him a glass of water. He always yelled for Peter, never for the other kids. If Peter didn't jump right away, Dad would yell at Peter and hit him. Peter would also have to unlace Dad's shoes and take them off and run get Dad's bucket if he was going to be sick.

11. Whenever Dad was home and he had been drinking (which was just about whenever he was home), he would yell at Peter and hit him. He would hit Peter hard enough to leave bumps and bruises. Dad was a steelworker and had big, strong hands. He would slap Peter so hard that it would leave a handprint on his face that lasted for hours.

12. Other times, Dad would grab Peter's upper arm, pick him up, and hold him in the air while he beat him, either with his hand or a belt. I still remember the sight of Dad unhooking his belt, pulling it off, and beating Peter with it everywhere. Dad would shake Peter's arm so hard, while holding him in the air, that it seemed like, if he shook any harder, Peter's arm would just snap off.

13. Holidays, in particular, were hell, and we dreaded them. We knew that Dad would be home and that he'd be drinking. We also knew that if Dad was home and he was drinking, he wouldn't want Peter around. We all knew that Dad would get drunk and be loud and mean and that he'd take everything out on Peter.

14. Peter never really did anything in particular to make Dad angry, it just seemed like he would get angry for no reason. I don't remember any of the other kids getting beaten like Peter was. I don't remember Dad ever hitting me. I wasn't afraid of Dad, but I was nervous all the time. I would just never know when he might explode. It was like we were always walking on eggshells around him.

15. When he was little, Peter would cry when Dad beat him. When he got older, he would hold it in. Peter held a lot .in and just stared at Dad. It seemed like, after a while, he was just resigned to the way things were.

16. Peter and Mom were very close. He always showed her love and affection. Whenever he would go out or come in, he would give her hug and a kiss. He called her "Momsie" and Mamasita." None of the other kids were so affectionate with Mom, or really with anyone else, for that matter. Peter was much more emotional than anyone else in the family.

17. It seemed like Mom was always at work when we were younger. But when she was home, she would try to protect Peter from Dad. If Dad was hitting Peter, or yelling at him, Mom would try to get into the middle of it. Mom and Dad would get into screaming matches about Peter. Mom would cry and ask, "Why are you doing this to him?" Dad would say something like, "He's drinking. He's staying out late. He's hardheaded." But Peter was just acting the way Dad did. Mom would threaten to leave Dad, but we all knew

that she wouldn't. She had no education and no real job skills, and she was scared that she wouldn't have any way to support herself and the kids.

18. I was still living at home when Peter started hanging out with the wrong people, drinking and smoking pot. I think Peter was probably in junior high at the time. I knew right away when Peter started using alcohol and pot. Every time he went out, he would come back either drunk or stoned I remember that he would come in with very bloodshot eyes and would eat everything in sight.

19. During this time, Peter would sometimes come home late and ask Mom to get up and make him something to eat. She always would. This used to make John Phillip mad, and he and Peter would sometimes get into a fight about it. John Phillip didn't like it that Peter was getting Mom out of bed late at night, and he also resented it because he believed that Peter was Mom's favorite. I think Mom treated Peter better because Dad was always so hard on him, and she was trying to make it up to him.

20. I was still in high school when Peter started not coming home for days at a time. Other times he would call home to see if Dad was there so that he could come home while Dad wasn't there. I'm not sure when Peter moved away from home for good, but when I was 23, I got pregnant with my first son and was living with my parents, and Peter was still living there.

21. Peter had a lot of friends that he hung around with. One time he was on a motorcycle trip with his friends, Reuben Garza, Gary Griffith, and Randy Griffith. Peter and Reuben were on a motorcycle together and Gary and Randy were on another motorcycle. Randy and Gary hit a train, and Randy was killed. Peter and Reuben skidded and were able to stop before they hit the train. Peter was very depressed and

withdrawn for a while after this happened. Another time, Peter and his friend Reuben Garza got into a car wreck only a block from our house. They ran into a telephone pole and Peter hurt his neck. Peter was 18 when this happened. Peter had been drinking when he got into both of these accidents.

22. I didn't have much contact with Peter after he left home. I heard from Juana that he had been arrested in Chicago and was in jail there. I visited him when he was in jail in Chicago.

23. After he was taken to Texas, I tried several times to contact his lawyers to find out about Peter and his case. I left messages at the lawyer's office three or four times, but I never got any response.

s/ Maria LeBlanc
Maria Soccoro LeBlanc

Subscribed and sworn to before me
This 25th day of May, 1993.

s/ Mary E. Newcomer
Notary Public
3194u

STATE OF ILLINOIS)
) ss.
COUNTY OF WHITESIDE)

AFFIDAVIT OF JESSIE MINIEL

Jessie Miniel, upon being sworn, states as follows:

1. I am Peter Miniel's mother. I have personal knowledge of the facts set forth in this affidavit and could, if called as a witness, competently testify thereto.

2. My husband, Manuel, and I adopted Peter when he was only three days old. Peter's natural mother, Carmen Hernandez, was my half-sister. We had the same mother but different fathers. At the time that she became pregnant with Peter, Carmen already had two children, Miguel and Maria Veronica. Carmen was getting a divorce from her husband and didn't want him to know that she was pregnant because she was afraid that he would try to take the baby. Also, she was poor and did not think she could have enough money to raise three children. So, before the baby was born, she decided to give him up for adoption.

3. When she became pregnant, Carmen went from her home in Sterling to Chicago to have the baby, so that her husband wouldn't find out that she had been pregnant. Carmen was a drinker, and I believe she drank when she was pregnant with Peter.

4. Before Peter was born, Carmen talked with Manuel and I and also with my brother, Joe Salazar, and his wife, Ophelia Salazar. Carmen was trying to find someone to adopt Peter, and she asked all of us to adopt Peter. Joe and Ophelia agreed to adopt Peter. At the time that Peter was born, however, Joe and Ophelia were on an extended visit to see some relatives in Texas and were out of town for three

weeks. Carmen wanted to get rid of Peter right away and would not wait for Joe and his wife to return from Texas. Carmen was afraid that Peter's father would find out that she had him. She asked me and Manuel to adopt Peter. I remember that, when Joe and Ophelia returned from Texas, they were very upset because they had wanted to adopt Peter.

5. Manuel and I didn't decide to adopt Peter right away. On the day that he was born, Carmen called us and asked us to come and see him in the hospital in Chicago. Manuel and I went to see Peter in the hospital and came home that night to think about whether we should adopt Peter. Manuel was against it at first. At that time, I was seven months pregnant with our fifth child and our youngest was only about two years old. Manual said that 1 wouldn't be able to take care of two babies. But I wanted to take of Peter, and so I cried and pleaded and begged and finally Manuel agreed.

6. My fifth child, Juan Fillipe, was born a couple of months after Peter joined our family. I had to buy another baby bed so that each of the babies would have his own bed. Juan Fillipe had colic and cried all the time, but Peter was an angel and slept all of the time. I could not sleep through Juan Fillipe's crying, but Peter had no trouble. As Peter grew through childhood, he was a very quiet and reserved child. I would ask him questions about whether he had been drinking, whether he had been beaten by Manuel, and other things about his life. He never gave me very complete answers. When Peter told me that Manuel hadn't beat them, I didn't believe him. I didn't think that Manuel beat the other children, but I was very worried about Peter. I never saw him cry. He would get very angry when I thought that he might really be sad. Peter would lock himself in his room. I felt like Peter was holding something back from me because he knew how much it would hurt me to know that Manuel was beating him.

7. I remember when Peter was about seven or eight years old I came home and saw that Peter had two black eyes and marks on his back that looked like he had been beaten. I asked him whether his father or his brothers beat him, and he said, "No, no, no." During this period of time, Peter would refuse to go to school because of his black eyes and because of the marks on his back. People from the school contacted me to find out why Peter was missing school. I told them that Peter refused to go to school because he was sick and didn't feel well.

8. In addition to my fear for Peter, I was especially afraid for my girls. I thought that Manuel could hurt them especially not only by beating them but by having sex with them. My fear for them was based on my own experience as well. When I was a little girl, my uncle abused me sexually. We had a barn out in the country that my brother and I played in. My uncle would catch me in the barn and ask me to have sex with him. At one time, he pulled my underwear down and unzipped his pants. At this point my brother came in, and my uncle told me to pull my underwear up and never mention this ever. He never actually had sex with me, but I was terrified of him. All of this happened when I was about seven years old. I never trusted anyone after that. I still fear for the children in my family. I have many grandchildren, and I worry about them.

9. After Juan Fillipe was born, I had one other child. In addition to Peter, I have six other children -- Guadelupe, Maria Secoro, Santiago, Maria Juana, Juan Fillipe, and Maria Marguerita. Peter is the only one of my children that is adopted. Since then Manuel and I have adopted two of Maria Marguerita's children, Fabian and Mario.

10. I didn't remember exactly when it was that Peter found out that he was adopted, but I think he was about 10 years old at the time. I'm not sure how he found out, but he was very upset about it when he did find out. Peter felt like Carmen, his real him mother, did not love him or want him and this hurt him very much. I know we should have told him from the very beginning, but I guess we wanted to wait until he was a little older. When he found out, Peter asked why we had lied to him.

11. When Peter found out about his being adopted, he started getting more and more rebellious. Peter was always gentle with me, but he and Manuel argued frequently. Manuel would tell Peter things, and Peter would say, "You can't tell me what to do." I remember Manuel saying to Peter, "I should punish you the way I was punished when I was a boy." Manuel was very strict.

12. When Peter started drinking, he would leave the house at night to go out partying with his friends, Manuel would lock the door to the house and say that nobody was to open it to let Peter in. But Manuel would pass out during the night, and when Peter would come home and knock on the door, I would let him in. The next morning Manuel would yell and ask who let Peter in. I would say that I did, and we would argue.

13. I remember when Peter was young the other children would tell me that their dad beat Peter. I asked Peter if this was true, and he denied it. I worried a lot that Manuel would maybe hurt the children because he was always drunk, and I was away working. I asked the girls if their father ever touched them in a bad way, but they told me no, and asked why I would ask them that. I believe that my marriage affected the way that I reacted to Manuel's relationship with my daughters. When I first married Manuel, I was very afraid of him. In looking back, I feel that we have not had a very

good relationship. I never told Manuel this. I try to be a good wife, and I didn't want Manuel to know that I was afraid of him or that I was unhappy.

14. Although Peter's natural father was alive when Peter was born, he went away soon after that, and Peter was never told anything about his father, that I know of. Peter and Manuel were always fighting and Peter never felt like Manuel was his real dad. Manuel was always telling Peter to stay out of trouble because, if Peter got into trouble, he wouldn't get him out.

15. When Peter was young, Manuel worked as a crane operator and crane mechanic at a steel mill, and I worked at a factory called Lawrence Brothers. Manuel worked on the day shift, and I worked nights, so Manuel was supposed to be responsible for the children when I was away at work. However, Manuel would often go out drinking and leave the children alone. I remember one time when I got a call at work that there had been a fire at the house. Peter had gotten into a fight with his brothers and sisters and had locked himself in one of our back bedrooms and was playing with a chemistry set there. Somehow the curtains caught on fire, and the house filled with smoke.

16. Peter started drinking heavily when he was a teenager. He would often drink so much that he would pass out and not know where or who he was. His friends would drop him off at the house, and the next day he wouldn't even know how he had gotten home. One day -- it was winter and the snow was deep -- we got a call from the neighbors that there was a body in the backyard. We went outside and saw that it was Peter, lying unconscious in the snow. We dragged him inside and called the ambulance. When the paramedics came, they said that he'd just had too much to drink and wouldn't do anything for him.

17. I never confronted Manuel about the fact that he might be beating Peter or that I feared for the safety of the girls.

18. All of my children have had problems with alcohol, and I believe that some of them are alcoholics. My daughter, Juana, has had severe problems with alcohol since she was a teenager. Some of my children have also used other drugs. Also, we had a lot of problems with Santiago when he was a teenager. He would leave and stay away for weeks. He would drive to New York a lot and never asked for any money. I think that he may have been dealing cocaine. We never really knew. He got caught once because he committed a burglary and spent some time in jail.

19. We tried many times to get Peter to go to some sort of alcohol treatment program, and sometimes he would agree that he would, but he never went.

20. Peter left home when he was in his teens. I do not remember how old he was when he loft. He went to Louisiana for about a year and then came back for several months. It was after that he left for Texas.

21. We learned that Peter had been arrested in Chicago and was then extradited to Texas for his trial. We went down to visit Peter when he was in jail in Houston. This was during the time that they were picking the jury. We would see Peter at court during the jury selection, but we were unable to talk to him there, and so we visited him every other day at the jail.

22. We tried to talk to Peter's attorney, Fred Heacock, to find out about his case, but he would always tell us that he was too busy to talk to us. We tried to set up appointments and went to his office, but he never had time for us. We were able to talk to Mr. Heacock for just a few minutes in the

hallway outside the courtroom. All he would tell us was, "Everything is going smooth." He never talked with us about testifying and never asked us any questions about Peter.

23. Before the trial started, Peter asked Manuel to bring me home; so we didn't stay for the trial.

24. I still can't believe that Peter could have done what they say he did. If things really happened the way they say they did, I wish it would have been Peter instead of that other boy that had been killed. Peter was always gentle and sweet to me and especially Juana.

25. I never learned to read or write. The notary has read this affidavit to me though, and I understand it.

s/ Jessie Miniel
Jessie Miniel

Upon reading this affidavit
aloud to the affiant and the
affiant having been duly
sworn and acknowledging the
testimony herein sworn to and
subscribed before me this
1st day of May, 1993

s/ Sylvia B Hey
Notary Public, State of Illinois

Jessie.pjm

AFFIDAVIT OF FRED M. HEACOCK

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day, personally appeared FRED M. HEACOCK, who being duly sworn upon his oath did depose and say:

"My name is Fred M. Heacock. I am presently licensed to practice law in the State of Texas and have been licensed in Texas since 1965. My Texas Bar number is 09318000. I was an assistant district attorney with the Harris County District Attorney's Office from February, 1966, until April, 1969. I am currently in private practice and my practice consists primarily of criminal defense work. I have tried fourteen death capital cases and two non-death capital cases in addition to countless felony and misdemeanor cases.

I am familiar with the allegations contained in the post conviction application for writ of habeas corpus filed in Ex parte Peter Miniel, cause number 450033-A.

I was appointed to represent Peter Miniel on charges of capital murder in cause number 450033, and Al Thomas was appointed to assist me. In preparation for trial, I reviewed the Harris County District Clerk's file and the State's file, including the police offense report, witness statements and photographs. I reviewed the State's file on several occasions and took copious notes. Ira Jones, who prosecuted Miniel's capital murder case, had an open file policy and the State's file was available for my review until trial started. I cannot remember whether we hired an investigator.

Also, prior to trial, I talked to Miniel's co-defendant, James Russell, and his attorney, Tommy Dunn. Dunn felt that he had obtained a good deal for his client and never said

anything about pressure being put on Russell to testify in a particular manner. Russell was very reluctant to talk to the defense or anyone else. In my conversation with Russell, I do not recall him ever stating that he was pressured to testify to certain facts or in a particular manner in Miniel's trial. My impression was that Russell also thought that he received a good deal from the State. Russell put the blame for the capital offense on Miniel.

The defense was upset that Russell testified for the State. Across the board, though, Miniel agreed with Russell's version of the facts of the instant offense as related at trial.

Prior to trial, I also had numerous conversations with Miniel and discussed the facts of the instant offense as well as possible mitigation evidence what we could present at trial. The State offered Miniel a life sentence before trial which I encouraged him to accept. Miniel had no remorse for the commission of the capital offense, however, and refused to plead to a life sentence. I never suspected that Miniel suffered from any mental health problems or mental retardation. Miniel was quite conversant and lucid. When the defense talked to Miniel, we asked him whether there were issues such as drug or alcohol problems that we could use for mitigation at punishment: Miniel told us that he had been shotgunning beers before the instant offense and that was brought out at trial. I do not remember whether we inquired about the possibility of childhood abuse.

I had some telephone conversations with Miniel's father before trial and also talked to him in person. Miniel's father never indicated that there was anything abusive or bad about Miniel's upbringing. I also talked to other family members prior to trial.

It is quite common for a defendant to complain that they are not happy with their representation and it is not

unusual for a defendant to ask the trial court to remove a defense attorney from a case. In this situation, Miniel was nervous about his trial. The trial court judge heard Miniel's motion that I be removed from the case. After I talked to Miniel and told him what we were doing on his case, Miniel informed the trial court that he wished to withdraw his motion.

At one time Miniel also indicated that he wished to represent himself. However, after Al Thomas and I talked to Miniel, he changed his mind and decided that he wished for Al Thomas and I to continue representing him.

Al Thomas and I discussed the possibility of Miniel testifying at the guilt/innocence or punishment phases of trial and Miniel initially indicated that he was not sure that he wanted to testify. Miniel eventually decided that he did not want to testify at either phase of trial. Further, the problem with calling Miniel as a witness was that Miniel would have been subject to wide open cross-examination by the State and he was not remorseful about committing the instant offense. For those reasons, we did not want to call Miniel as a witness.

Miniel's claim that I failed to request a charge on the confession is simply not true. I did make a written request that an instruction be given to the jury in the court's charge on the voluntariness of the confession, but my request was denied by the trial court. My written request and the court ruling are part of the record in this cause. The State, however, did not introduce Miniel's audio taped confession at trial.

With respect to the allegation that I was ineffective for failing to cross-examine latent print examiner Wesley Sheldon, it has been my experience that it is best to leave a witness alone if he does not hurt you on direct examination. Sheldon's testimony on direct examination was that there

were no identifiable prints removed from the murder weapons. With respect to allegations regarding my cross-examination or lack of cross-examination of other witnesses during trial, I questioned witnesses when I though it was appropriate and in a manner consistent with my trial strategy. I also objected to the State's leading questions when I thought it was appropriate. It was a judgment call and I would not object when the leading was not hurting the defense.

After consulting with my co-counsel, Al Thomas, we decided that Al Thomas would conduct any cross-examination of co-defendant James Russell. After asking Russell some preliminary questions about his statement, we decided not to crossexamine him further because his testimony was not all that damning to Miniel. Russell, of course, blamed Miniel for the capital offense. When he testified, however, Russell was not animated and he appeared reluctant to testify. After co-counsel asked Russell a few questions on cross-examination, we decided to postpone further questioning of him until we saw how the remainder of the trial turned out. We later conferenced about whether to further cross-examine Russell and decided to not call him back as a witness. I thought that further cross-examination of Russell would only emphasize Miniel's involvement in the offense to the jury. Our strategy was to limit Miniel's exposure at guilt/ innocence. Miniel was involved in the discussion of whether to further crossexamine Russell and concurred in our decision to forego further questioning. In fact, Miniel was involved in all strategy decisions, including the voir dire of the jury. There was no formal agreement between the defense and State to not cross-examine co-defendant James Russell.

As noted above, Miniel's father, mother, and sister were present for part of the trial and I talked to Miniel's father about testifying on Peter Miniel's behalf. After Miniel's father listened to several days of the State's case-in-chief, he

felt that he had had enough and told me that he and Miniel's mother had to return home. Miniel's sister did not testify at trial because she did not want to get involved. Even though I encouraged family members to testify, my impression was that they did not want to participate or get involved with the trial. I could not ascertain whether there was anything favorable that individual family members could say about Miniel as the family did not seem to have warm feelings about him. I was not even sure that they would ask the jury to spare Miniel's life.

We did not have the family members under subpoena for trial. From experience, I knew that family members who are forced to testify do not make good witnesses. After Miniel's father left, I told Miniel's family that someone should testify that Miniel should not die and the family said that they would not do that. I did not push the issue as I felt that, aside from the family's reluctance to testify and the possibility that they would make a poor impression on the jury, Miniel's family would have been vulnerable on cross-examination because Miniel had not been a model child. In sum, I was reluctant to force any of Miniel's relatives to testify because there was a certain warmth missing in their feelings for Miniel and I could not be sure of what they might say on cross-examination.

I deny that I ever refused to talk to Miniel's family members. I was happy to talk to them. I talked to Miniel's father in person and on the telephone.

If Miniel had suggested other witnesses who might have been able to testify favorably for him at guilt/ innocence or punishment, I would have checked into these witnesses. Miniel did tell us of an individual named Juan who was supposed to be his friend. However, the only information that we had on Juan was his first name and that he worked in a Speedy Car Wash in Humble, Texas. We were not successful

in locating Juan and did not have enough information to subpoena him.

I never uncovered evidence suggesting that Miniel was kind and gentle. Miniel was simply a thug who had no remorse for his actions."

I, FRED M. HEACOCK, state that the matters above are true and correct to the best of my knowledge.

s/ Fred M. Heacock

Sworn to and Subscribed before me on this 4th day of Feb. 1999.

s/ Emeraldu Gaardilla
NOTARY PUBLIC
STATE OF TEXAS

(2)

No. 03-811

In the Supreme Court of the United States

PETER J. MINIEL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Peter J. Miniel respectfully submits this reply brief in support of his petition for writ of certiorari. For the reasons discussed in Mr. Miniel's petition and in this reply, reasonable jurists would find the district court's denial of his ineffective assistance of counsel claim debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003). Accordingly, the lower court's denial of Mr. Miniel's request for Certificate of Appealability was in error and should be reversed.

DISCUSSION

I. THE FIFTH CIRCUIT'S CONCLUSION THAT MR. MINIEL'S TRIAL COUNSEL PERFORMED A CONSTITUTIONALLY SUFFICIENT INVESTIGATION OF POTENTIAL MITIGATING EVIDENCE CONSTITUTED AN UNREASONABLE APPLICATION OF THIS COURT'S DECISIONS IN *WIGGINS* AND *WILLIAMS*

Affidavits offered in support of Mr. Miniel's petition for post-conviction relief detail powerful mitigating evidence that Mr. Miniel's trial counsel failed to discover because he failed to undertake a reasonably adequate investigation. *See* Petitioner's Appendix at A-113 – A-151. The State incorrectly contends that Mr. Miniel failed to sufficiently establish that the various affiants who support his claim for post-conviction relief would have been willing to testify on his behalf and that this claimed failure, by itself, is a sufficient basis for denying Mr. Miniel's petition. Respondent's Brief in Opposition ("Opposition") at 17-18. The State made a similar argument to the Fifth Circuit, but

that court did not adopt it in support of its decision. In fact, the State's contention is wholly unsupported by the record.

The affidavits submitted by Mr. Miniel show a family that was concerned for Mr. Miniel's well-being and that was ready, willing and able to assist in Mr. Miniel's defense, but never got the chance because of trial counsel's ineffectiveness. Indeed, one of Mr. Miniel's sisters states specifically that she attempted to contact Mr. Miniel's trial counsel because she wanted to help in any way she could. Appendix at A-127. Another sister states that she attempted to contact Mr. Miniel's trial counsel several times but received no response. Appendix at A-144. Mr. Miniel's mother, father, and another sister spent a month in Houston at the time of Mr. Miniel's trial, but their repeated efforts to find out if there was any way in which they could provide assistance were rebuffed by Mr. Miniel's trial counsel. *See, e.g.,* Appendix at A-150.

Cases cited by the State on this point are inapposite. *Alexander v. McCotter*, 725 F.2d 595 (5th Cir. 1985), is the only one of those cases to address the issue in the context of a claim that a failure to investigate possible mitigating evidence constituted ineffective assistance of counsel. There the court rejected the claim based on its determination that the petitioner had failed to offer any detail regarding the identities of the claimed omitted witnesses or what the testimony of such witnesses might reveal. Here, in contrast, Mr. Miniel has done far more than refer generally to possible mitigating evidence. Rather, he has provided affidavits of family members who should have been, at the very least, thoroughly interviewed in connection with developing an effective mitigation case. These affidavits are rich with detail regarding the mitigating testimony that those witnesses could have provided.[1]

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[1] The two other cases cited by the State deal, not with a claim for post-conviction relief, but a denial of a request for trial continuance to

However, even assuming, *arguendo*, that the members of Mr. Miniel's family, who have now submitted detailed affidavits, would not have been willing to testify at trial, this plainly does not relieve counsel of his duty to thoroughly investigate possible investigating evidence. As the Court confirmed in *Wiggins v. Smith*, ___ U.S. ___, 123 S. Ct. 2527 (2003), "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2938. Had Mr. Miniel's trial counsel adequately interviewed Mr. Miniel's family, he would have learned about Mr. Miniel's head injuries, his long time alcohol and drug use, his difficulties in school, and the extreme physical and emotional abuse that he had experienced. Knowing these facts, reasonable counsel would have been led to investigate further by engaging an expert to examine Mr. Miniel and determine what impact these circumstances may have had on his mental functioning. Such an examination would have revealed, in turn, powerful mitigating evidence of Mr. Miniel's brain impairment and mental disabilities. *See* App. at A-97-A - 112.

The State and the lower courts relied heavily on the report of Dr. Brown, who, at the request of the prosecution,

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allow time to locate allegedly missing witnesses. In *United States v. Olaniyi-Oke*, 199 F.3d 767 (5th Cir. 1999), the defendant was seeking a continuance to allow him an opportunity to call a witness who, he said, would testify that another person had committed the crime. The court, however, found that the testimony that the defendant claimed the witness would provide was directly contradicted by a prior sworn statement by the witness. It was on this basis that the court found that the defendant had failed to show that the witness was able and willing to testify.

In *United States v. Forster*, 128 F.3d 946 (6th Cir. 1997), the defendant sought a continuance on the grounds that the government had acted improperly by intimidating a potential witness. The court did not resolve this claim because it granted relief on other grounds.

performed a court-ordered evaluation of Mr. Miniel to determine his competency to stand trial, as justifying counsel's failure to perform an investigation of Mr. Miniel's mental condition. The Fifth Circuit stated, "Miniel's trial counsel, Mr. Fred Heacock, explains in his affidavit that Mr. Miniel was tested by the State's psychologist." Appendix at A-21. This statement, however, is simply incorrect. Mr. Heacock's affidavit does not once mention Dr. Brown's evaluation. Appendix at A-152 – A-157. Mr. Miniel's trial counsel does not, in fact, claim that he ever reviewed Dr. Brown's report, much less that he relied on it as a basis for concluding that investigation of Mr. Miniel's mental functioning would be futile.[2] Mr. Miniel's trial counsel states only that he "never suspected" that Mr. Miniel suffered from any mental health conditions. Appendix at A-153. Counsel does not offer any professional evaluation or expert opinion in support for his conclusions. Such off-the-cuff, inexpert impressions cannot stand as a constitutionally sufficient reason for not conducting further investigation.

Mr. Miniel's trial counsel's summary, unsupported conclusion that Mr. Miniel lacked "warm feelings" for Mr. Miniel did not constitute a reasonably adequate investigation. The question was not whether Mr. Miniel's family had warm feelings, but whether there was evidence that they could provide that might cause a juror to answer "no" to one of the special issue questions. Although a reasonable counsel, faced with a family so cold and unfeeling as the one portrayed here, would have investigated the possibility of a history of child abuse, Mr. Miniel's trial counsel now acknowledges that he cannot recall whether he inquired about the possibility of

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[2] Indeed, Dr. Brown's report reflects that Mr. Miniel described to him a significant history of alcohol and drug abuse, facts of which Mr. Miniel's trial counsel was apparently unaware. Compare Tr. at 34 – 35 with Appendix at A-153.

child abuse. Appendix at A-153.[3] Thus, even taking counsel's affidavit at face value, the disturbing characterization that he relates of Mr. Miniel's family should only have served to spur additional investigation.

Moreover, even assuming that there was evidence that Mr. Miniel's trial counsel had relied on Dr. Brown's competency evaluation as a basis for foregoing a psychological evaluation for purposes of investigating possible mitigating evidence, such reliance would have been patently unreasonable. Dr. Brown's report describes the narrow scope of that evaluation, specifically stating that Mr. Miniel "was seen for competency evaluation . . . pursuant to court order." Tr. at 34. The purpose of Dr. Brown's report was not to determine the existence of mitigating evidence, nor could it reasonably be considered to substitute for an evaluation for that purpose. Thus, although Dr. Brown pronounced Mr. Miniel competent to stand trial, this could not reasonably satisfy counsel's obligation to thoroughly investigate possible mitigating evidence. There plainly are a number of mental conditions that, although they might not render a defendant incompetent to stand trial, would still be highly relevant to the jury's consideration of appropriate punishment.

The State, in opposition to the petition, notes that the lower court found that Dr. Brown's report "did not reveal any history of physical or emotional abuse." Opposition at 16. Indeed, the report is wholly silent on this issue – which would be an important element of any reasonably thorough investigation of a potential mitigation case. There is no evidence that Dr. Brown ever asked Mr. Miniel about a history of abuse, nor would such an inquiry have necessarily

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[3] Although Mr. Miniel's counsel states, in a general way, that he talked with members of Mr. Miniel's family, the only family member that he is able to specifically identify as someone he talked to was Mr. Miniel's father, who was also Mr. Miniel's abuser.

been relevant to the purpose of Mr. Brown's evaluation. Certainly Dr. Brown's silence on the issue of prior abuse could not be reasonably taken by Mr. Miniel's trial counsel as an adequate basis for ruling out the possibility and foregoing any investigation of the issue.

Had Mr. Miniel's counsel performed a constitutionally adequate investigation, then he could have made strategic choices about what mitigating evidence to present. However, a wholesale failure to investigate cannot be justified as a strategic choice. *See Wiggins*, 123 S. Ct. at 2541 ("A decision not to investigate this 'must be assessed for reasonableness in all circumstances,'" *quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2052). Rather than performing the investigation necessary to make strategic choices about Mr. Miniel's defense, Mr. Miniel's trial counsel simply put on the mitigating evidence, such as it was, that he had readily at hand. None of the three witnesses at trial who were called on Mr. Miniel's behalf knew anything about Mr. Miniel's life before the crime. Mr. Miniel's trial counsel first spoke with two of those witnesses only the day before they testified. 28 S.F. at 94, 104. *Cf. Williams v. Taylor*, 529 U.S. 362, 395 (2000) ("The record establishes that counsel did not begin to prepare for [the penalty] phase of the proceeding until a week before the trial.").

Mr. Miniel's trial counsel did even less than the investigation found to be constitutionally ineffective in *Wiggins*. Wiggins' counsel reviewed a presentence investigation report and social service records relating to his client and also retained a psychologist to evaluate his client's mental functioning. Mr. Miniel's trial counsel did neither of these things. This is not a case, as the State asserts, where Mr. Miniel is claiming that his counsel was obligated to "shop for psychological impairment evidence." In fact, Mr. Miniel's trial counsel made no effort at all to investigate his client's mental functioning as a source of mitigating evidence. Further, to the extent that counsel could be said to have made

a decision not to undertake such an investigation, he did so without a reasonable basis, contrary to *Wiggins*.

II. THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE PROBABILITY THAT THE OMITTED MITIGATING EVIDENCE WAS SUCH THAT IT WOULD HAVE CAUSED ONE JUROR TO ANSWER ONE OF THE TWO SPECIAL ISSUE QUESTIONS IN THE NEGATIVE

As set forth in Mr. Miniel's petition, the proper prejudice analysis asks whether there is a reasonable probability that the omitted evidence, together with the evidence that was presented, would have caused one juror to change his or her vote on one of the special issue questions. The State does not dispute that this is the proper test. Indeed, one "no" vote by one juror to one of the two special issue questions would have been enough to change the outcome of the case.

The State argues, and the lower court found, that Mr. Miniel has failed to show prejudice resulting from his trial counsel's failure to investigate and present mitigating evidence because the additional mitigating evidence, had it been presented: 1) would have been "overwhelmed" by other evidence of his future dangerousness, including evidence of Mr. Miniel's past violent behavior; and 2) was not "unequivocally mitigating." The Fifth Circuit's reasoning is contrary to this Court's decisions in *Wiggins* and *Williams*. Indeed, if this were the law, the Court would not have found prejudice in either *Wiggins* or *Williams*.

In *Williams*, this Court found that evidence of Williams' history of childhood abuse and borderline mental retardation, together with evidence of remorse and good behavior while in prison – which was very similar to the mitigating evidence in this case – "might well have

influenced the jury's appraisal of his moral culpability," even if it was not sufficient to overcome a finding of future dangerousness. 529 U.S. at 398. Here, the Fifth Circuit never considered whether there was a reasonable probability the mitigating evidence, including the evidence that was presented and the evidence that was omitted, would have influenced even one juror's appraisal of Mr. Miniel's moral culpability. Thus, in evaluating prejudice, the Fifth Circuit failed to address the full potential impact of the evidence, focusing exclusively on the issue of future dangerousness while ignoring the effect of the evidence on the jurors' consideration of whether Mr. Miniel's conduct was "deliberate," for purposes of the second special issue question.

However, the Fifth Circuit was wrong even in its analysis of the relationship of the mitigating evidence to the issue of future dangerousness. The lower court found that the omitted evidence would not have made any difference because it would have been overwhelmed by evidence of Mr. Miniel's past violent conduct. However, in *Williams*, the defendant, unlike Mr. Miniel, had an extensive history of prior violent conduct, including savagely beating an elderly woman, stealing two cars, setting fire to a house, stabbing a man during a robbery, choking two inmates and breaking a fellow prisoner's jaw. 529 U.S. at 418. Yet the Court did not find that this violent history was so "overwhelming" as to prevent a finding of prejudice arising from counsel's failure to offer mitigating evidence very similar to the evidence at issue here.

Nor can the prejudice arising from the omission of this evidence be denied on the ground that the evidence is not "unequivocally mitigating." In *Williams*, this Court similarly observed that "not all of the additional evidence was favorable to Williams." 529 U.S. at 396. Yet that fact did not lead the Court to conclude that the omission of mitigating evidence did not cause prejudice to Williams. Indeed,

mitigating evidence at issue in *Williams* (severe physical abuse as a child, repeated head injuries, possible organic mental impairments) and *Wiggins* (sexual abuse as a child) was no less "double-edged" than the very similar mitigating evidence that Mr. Miniel has offered. Applying the reasoning used by the Fifth Circuit in this case, the omission of mitigating evidence in *Wiggins* and *Williams* could not caused any prejudice because that evidence might have lead the jury to conclude that the defendant actually presented a *greater* risk of future dangerousness. Notwithstanding, this Court found in both *Williams* and *Wiggins* that it was sufficiently likely that the presentation of the evidence would have changed the outcome of the trials in those cases and that counsel's failure to discover and present that evidence deprived the defendants of their Sixth Amendment right to counsel. Indeed, as this Court recognized in *Penry v. Lynaugh*, "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." 492 U.S. 302, 319 (1989).

CONCLUSION

Accordingly, Peter J. Miniel requests that the Court grant his petition for writ of certiorari.

Dated: January 30, 2004.

GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.

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Supreme Court, U.S.
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JAN 20 2004
OFFICE OF THE CLERK

No. 03-811

IN THE SUPREME COURT OF THE UNITED STATES

PETER J. MINIEL,
Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the federal district court's decision that Miniel was not denied constitutionally effective counsel due to trial counsel's decision not to conduct further psychological evaluation of Miniel when counsel's interactions with Miniel as well as a pre-trial sanity and competency examination did not reveal that Miniel potentially suffered from any mental problems is debatable.

2. Whether the federal district court's decision that Miniel was not denied constitutionally effective counsel due to trial counsel's alleged failure to discover evidence of a deprived and abusive family background is debatable.

3. Whether the federal district court's decision that the mitigating evidence proffered at trial was not beyond the scope of the special issues and that Miniel could not premise a mitigating evidence instruction claim on evidence not presented at trial is debatable.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Peter J. Miniel ("Miniel")[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. § 2254. In the courts below, Miniel alleged, *inter alia,* that he was denied constitutionally effective counsel during the punishment phase of trial because counsel failed to adequately investigate Miniel's mental condition and family background and that he was denied jury instruction on mitigating evidence. However, the federal district correctly rejected these claims under *Strickland*[2] and *Penry*,[3] and their progeny, and the court of appeals's decision to deny Miniel a certificate of appealability ("COA") was correct. As a result, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

The federal district court accurately summarized the evidence supporting Miniel's capital murder conviction in its order denying habeas relief:

> On May 8, 1986, Miniel and James Warren Russell, Jr., drove to Galveston from Houston. Miniel and Russell drove around Galveston

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[1] Respondent Doug Dretke will be referred to herein as "the Director."

[2] *Strickland v. Washington,* 466 U.S. 668 (1984).

[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

drinking beer they purchased with a stolen credit card. While driving by the seawall, they saw two men rolling a joint of marijuana. Miniel told the two men that he would buy gasoline and beer for them in exchange for marijuana. The two men, Sammy Rogers and Chris Miln, told Miniel to follow them back to Houston to get some marijuana.

When the group arrived at an apartment in Houston, [Paul] Manier was just getting out of the shower. After a while Miniel, Miln, and Rogers left to find some marijuana and to take Miln home. When Miniel and Rogers returned from acquiring marijuana, they all sat around smoking joints and drinking beer. Rogers eventually passed out. Miniel then told Russell that he thought Manier had money and that they should rob him. Miniel concocted a plan where Russell would pretend to procure some cocaine, distracting Manier so they could render him unconscious. Russell went out to his car, pretending to retrieve cocaine. When he returned, he found Miniel and Manier in Manier's bedroom. Russell saw Manier clean a small mirror to use in snorting cocaine. While Manier leaned over the mirror, Miniel struck him in the back of the head with a beer mug. Manier fell to his knees, covering his head while Miniel continued to strike him. After Manier fell on his side, Russell hit him several times in the head with a shock absorber that had been sitting on a table. Miniel told Russell that he was not hitting him hard enough and then used the shock absorber himself. When Miniel found that he could not knock out Manier, he told Russell to stab him with a small knife. Russell was unable to carry through with this

> order, and Miniel himself stabbed Manier numerous times. Russell then held Manier while Miniel attempted to slit his throat. Finally, Miniel attempted to asphyxiate him by shoving a blanket down his throat.
>
> Miniel took Manier's wallet and became angry when he discovered that they killed a man for only twenty dollars. They then searched the apartment for drugs or money. Miniel and Russell left the apartment, stealing Manier's stereo equipment. They washed off Manier's blood and hid the knife. Miniel and Russell then went to Burger King to eat hamburgers.
>
> Miniel was eventually arrested at his sister's apartment in Chicago, Illinois. The police recovered some of Manier's stereo equipment from another individual in the apartment building. At a Chicago police department substation, Miniel made an oral statement confessing to Manier's murder.

Miniel v. Cockrell, Civil Action No. H-00-4361, slip op. at 1-4 (S.D. Tex. Oct. 29, 2001) (unpublished opinion) (internal record citations omitted); Petitioner's Appendix 35-37.

II. Facts Relating to Punishment

The federal district court also accurately summarized the punishment phase evidence as follows:

> During the punishment phase of Miniel's trial, the State reintroduced all the evidence from the guilt/innocence phase. The State also introduced evidence of Miniel's many prior offenses in

Illinois. The State introduced evidence of Miniel's guilty plea to a charge of aggravated battery resulting from beating his girlfriend with a wooden spoon and a motorcycle chain. The State also introduced another previous charge of aggravated battery where Miniel beat someone with numchucks. Other offenses adduced by the State included two unlawful-use-of-weapons charges, a retail theft charge, and a charge of disorderly conduct. The State also presented evidence of Miniel's poor parole history. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person.

Miniel called three witnesses in the punishment phase. Darryl Hendrichson, a Harris County Sheriff's Department employee in the Harris County jail, testified about Miniel's behavior while incarcerated. Hendrichson testified that Miniel had never presented a disciplinary problem during his incarceration before trial.

Carol Ruth Weed, a prospective juror in Miniel's case, also testified in his behalf. After she was dismissed from jury service, Weed felt that she had made a connection with Miniel. Weed visited him in jail every week while he awaited trial. They spoke mostly about religion and she opined that Miniel's religious inclination was genuine, not "foxhole religion."

Finally, the defense called Juan Cortez, an assistant Harris County chaplain. Cortez testified that Miniel attended church service almost every week while incarcerated. Cortez testified that Miniel's religious devotion seemed sincere. Cortez testified

> that those in society who accept their guilt and seek to be an instrument for good in society should be given a second chance.

Miniel v. Cockrell, slip op. at 4-6 (internal record citations omitted); Petitioner's Appendix 38-39.

III. Procedural History

Miniel's conviction (October 10, 1988) and death sentence (October 12, 1988) — for the capital murder of Paul Manier — were affirmed on direct appeal on January 29, 1992, and this Court denied certiorari review. *Miniel v. State,* 831 S.W.2d 310 (Tex.Crim.App.), *cert. denied*, 506 U.S. 885 (1992). Miniel then filed a state application for writ of habeas corpus in the trial court raising, among other things, the substantive claims presently before this Court. The trial court entered findings of fact and conclusions of law recommending that Miniel's application be denied. SHTr[4] 1172-1200; Petitioner's Appendix 69-96. The application was denied by the Court of Criminal Appeals based upon the trial court's findings of fact and conclusions of law. *Ex parte Miniel,* No. 42,833-01 (Tex.Crim.App. Dec. 15, 1999) (unpublished order); Petitioner's Appendix 33-34.

One day before the limitations period expired, December 14, 2000, Miniel filed a 173- page federal habeas petition raising twenty-four claims for relief. On October 29, 2001, the district court granted the Director's motion for summary judgment and denied Miniel's request for habeas relief. *Miniel v. Cockrell,* Civil Action No. H-00-4361, slip op. (S.D. Tex. Oct. 29, 2001) (unpublished opinion); Petitioner's Appendix 35-68 (redacted

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[4] "SHTr" refers to the state habeas transcript followed by page number. "Tr" refers to the trial transcript (or clerk's record) followed by page number.

copy). Also, the district court denied Miniel a COA on his claims. *Miniel v. Cockrell,* slip op. at 122-23.

On appeal, the lower court denied COA with respect to the claims before the Court. Specifically, the court found that Miniel's mitigating evidence proffered to the jury of drug and alcohol use at the time of the offense, youth, good behavior while incarcerated, and religious conversion were not beyond consideration under the special issues[5] and that evidence not proffered to the jury could not form the basis of a complaint regarding the absence of a mitigating evidence instruction. *Miniel v. Cockrell*, 339 F.3d 331, 337-38 (5th Cir. 2003). The court also found that the district court's resolution of Miniel's complaints regarding his counsel's performance during sentencing had not been shown to be debatable or wrong, at least as to the deficient performance prong on one claim and the prejudice prong on the other. *Id.* at 344-48. Rehearing was denied by the lower court on August 18, 2003. Petitioner's Appendix 29-30. This proceeding followed.

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[5] The following two special issues were submitted to the jury at sentencing:

> Was the conduct of the Defendant, Peter J. Miniel, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Peter J. Miniel, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr 338-39.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2003). Miniel advances no compelling reason in this case, and none exists. As a result, certiorari review should be denied. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996, which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2003).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

The Court also held that a federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 123 S. Ct. 357, 361 (2002). The Fifth Circuit has explained that it is the state court's "ultimate decision" that is to be tested for reasonableness, "not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied,* 535 U.S. 982 (2002).

Additionally, unless Miniel obtained a COA, the lower court had no jurisdiction to hear his claims on appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, Miniel was required to make a substantial showing of the denial of a constitutional right, a demonstration which includes showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)); *Miller-El*, 537 U.S. at 336 (quoting *Slack* and

Barefoot). As this Court explained in *Miller-El*,

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. . . .

537 U.S. at 336.

Importantly, "a COA does not require a showing that the appeal will succeed" and "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. On the other hand, "issuance of a COA must not be pro forma or a matter of course" and a "prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* at 337-38 (internal citation and quotations omitted).

As discussed below, the lower court conducted the appropriate threshold inquiry in light of this Court's decision in *Miller-El*, found that Miniel's COA application did not meet these standards and, therefore, denied a COA. This determination should be upheld, and certiorari review should be denied.

II. The Court of Appeals Properly Held that the District Court's Application of the AEDPA to Miniel's Ineffective Assistance of Counsel Claims Was Not Debatable or Wrong.

Miniel complains that he was denied constitutionally effective counsel during the punishment phase of trial because counsel failed to adequately investigate Miniel's mental condition and family background. However, the district court here correctly applied the AEDPA to the state court decision and found that Miniel failed to establish the objective unreasonableness of that decision.

A. The *Strickland* standard

In order to establish a Sixth Amendment ineffective assistance of counsel violation, a habeas petitioner must affirmatively prove that: (1) in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.*, counsel's performance was deficient under "prevailing professional norms;" and (2) the resultant prejudice was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687-88, 690. The failure to prove either element is fatal to the claim. *Id.* at 697.

In applying the "deficiency" prong, judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight" and to "evaluate the conduct from counsel's perspective at the time." *Wiggins v. Smith*, 123 S. Ct. 2527, 2536 (2003); *Strickland,* 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance," and this Court may "not find ineffective assistance of counsel merely because it disagrees with counsel's trial strategy." *Bell v. Cone,* 535 U.S. 685, 698 (2002); *Strickland,*

466 U.S. at 689.

Counsel has a duty to make reasonable investigations on behalf of his client. *Strickland,* 466 U.S. at 690-691. As the Court recently explained:

> In light of [*Strickland* and *Williams*], our principle concern in deciding whether [trial counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable.* In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Wiggins, 123 S. Ct. at 2536 (internal citations omitted, emphasis in original).

However, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins,* 123 S. Ct. at 2535 (quoting *Strickland,* 466 U.S. at 690-91). This is because "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id.* at 2541. "Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id.*

Finally, in order to prove prejudice, a habeas petitioner must show a reasonable probability that, but for counsel's assumed deficiencies during punishment, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death;" a "reasonable probability" is one sufficient to undermine confidence in the outcome. *Wiggins,* 123 S. Ct. at 2542; *Strickland,* 466 U.S. at 694-95. However, "it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding." *Williams,* 529 U.S. at 394; *Strickland,* 466 U.S. at 693.

B. Factual background and disposition in state court

When Miniel first raised the instant claims during state habeas proceedings, he included several affidavits from various friends and family members which purportedly chronicled his personal history.[6] The substance of those affidavits was summarized by the federal district court as follows:

> . . . . Miniel was the illegitimate child of Carmen Cantu, who allowed her sister's family to adopt him shortly after birth. Until age ten, Miniel thought that he was born into his adoptive family. When he found out that he had been adopted, the other family members taunted him, and his behavior changed for the worse. The affidavits speak of Miniel's adoptive father as a violent alcoholic, who severely beat his children, especially Miniel.

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[6] Affidavits attached to the instant petition as Petitioner's Appendix 113-51 appear to be among those submitted to the state habeas court.

> Miniel apparently had a stormy home life, in constant contention with his adoptive parents and siblings. Miniel began abusing drugs and alcohol at a very young age. The affidavits note that Miniel had been involved in motor vehicle accidents that profoundly affected him. The affidavits also chronicle a history of suicidal behavior by the Miniel family. Each of Miniel's family members state that trial counsel only spoke with them briefly. They state that counsel never talked with them about testifying or asked them any questions about Miniel.

Miniel v. Cockrell, slip op. at 107-08; Petitioner's Appendix 62.

Miniel also presented the state habeas court with a "neurological and psychological evaluation," which appears to be the same as attached to the instant petition at Petitioner's Appendix 97-112. That evaluation concluded that Miniel "suffers from mild to moderate neuropsychological brain impairment." Petitioner's Appendix 110. The report suggested that this dysfunction "limits his ability to think, reason, and control impulses." *Id.* Additionally, the evaluation stated that Miniel's brain dysfunction and symptoms of "Post Traumatic Stress Disorder" caused him to act in a "highly impulsive," "irrational," and "often explosive manner." *Id.* at 111.

Included in the State's response to the petition was an affidavit from trial counsel, which appears to be the same as that attached to the instant petition at Petitioner's Appendix 152-57. Counsel noted that although he had "numerous conversations" with Miniel, he never observed any mental health problems or signs of mental retardation. *Id.* at 153. Also, when counsel asked Miniel about any history of substance abuse, Miniel only referred to his intoxication on the night of the crime. *Id.* Counsel stated that he could not recall whether he asked Miniel about the

possibility of childhood abuse. *Id.* Counsel related that he spoke to Miniel's family prior to trial, including phone conversations with Miniel's father, but indicated that he was not told about any negative aspects of Miniel's upbringing. *Id.* Counsel also recalled that although Miniel's father, mother, and sister were present for part of Miniel's trial, his father and mother returned to their out-of-state home after listening to a portion of the State's case-in-chief. *Id.* at 155-56. Miniel's sister did not testify at trial because "she did not want to get involved." *Id.* at 156. Indeed, counsel stated that he could "not ascertain whether there was anything favorable that individual family members could say about Miniel as the family did not seem to have warm feelings about him." *Id.* Those feelings were apparently so indifferent that counsel recalled that he "was not even sure that they would ask the jury to spare Miniel's life." *Id.* Even after Miniel's father left, the remaining family refused to testify on Miniel's behalf. *Id.* Counsel stated that he did not "push the issue as I felt that, aside from the family's reluctance to testify and the possibility that they would make a poor impression on the jury, Miniel's family would have been vulnerable on cross-examination because Miniel had not been a model child." *Id.*

The state habeas court found that trial counsel's affidavit was credible. Petitioner's Appendix 73-74. It found that Miniel was involved in all of the strategic decisions that took place during trial. *Id.* The court also noted that despite the mitigating evidence included in the family members' affidavits, none of those individuals indicated that they would have been available and willing to testify on Miniel's behalf. *Id.* at 74. The court specifically found trial counsel's explanation that the family members did not want to participate or get involved to be credible. *Id.* The court therefore concluded that Miniel had failed to demonstrate either deficient performance or prejudice, noting that he had not shown that there were witnesses willing to testify on his behalf or that their testimony would have benefitted the defense. *Id.* at 85.

The state court also concluded that trial counsel was not deficient for failing to uncover any mental deficiencies. The court noted that Miniel had been evaluated prior to trial by clinical psychologist Dr. Jerome Brown, who concluded that Miniel was sane at the time of the offense and was competent to stand trial. *Id.* at 74-75; Tr 34-37.[7] The court noted that Miniel did not reveal any history of physical or emotional abuse to Dr. Brown during their interview. Petitioner's Appendix 75. The court found that counsel's observations were consistent with those of Dr. Brown in that Miniel "failed to demonstrate any signs of psychological problems or mental illness." *Id.* Ultimately, the court concluded that counsel was not ineffective in failing to have Miniel evaluated by another psychological expert. *Id.* at 86.

C. Federal court resolution

As to Miniel's claim of counsel's failure to discover the possibility of mental or psychological disorders, the federal district court found that the state court decision was not objectively unreasonable and the lower court, in turn, found that the district court's decision was not debatable or wrong. *Miniel*, 339 F.3d at 345. Initially, the state court's credibility choice in favor of counsel's averments, as set forth above, was entitled to deference under 28 U.S.C. § 2254(e) and compelled rejection of this claim. Indeed, both of the lower federal courts found that there was nothing in the record to suggest that counsel was or should have been alerted to any potential mental deficiencies. *Miniel*, 339 F.3d at 345; *Miniel v. Cockrell,* slip op. at 112; Petitioner's Appendix 65. Miniel's present disagreement with the lower state and federal courts' rejection of this claim amounts to nothing more than requesting this Court to announce that counsel are obliged to shop

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[7] Dr. Brown also estimated Miniel's intellectual capacity in the average range, and related that he failed to observe any indications of severe mental illness or mental defect. Tr 36.

for psychological impairment evidence or experts when the potential presence of such impairment evidence is not observed or indicated through counsel's, and a court-appointed mental health expert's, interactions with a defendant. This is not the law, as the lower court aptly noted. *Miniel*, 339 F.3d at 345; *see Dowthitt v. Johnson,* 230 F.3d 733, 748 (5th Cir. 2000) (holding that "trial counsel was not deficient by not canvassing the field to find a more favorable defense expert"), *cert. denied,* 532 U.S. 915 (2001); *Barnard v. Collins,* 958 F.2d 634 (5th Cir.1992) (where defense counsel had no reason to suspect that petitioner suffered from mental defect, failure of counsel to conduct an investigation into such matters not deficient performance), *cert. denied,* 506 U.S. 1057 (1993).

As to Miniel's claim of counsel's failure to discover evidence of a deprived and abusive family background, the most glaring flaw in this claim, as found by the state and federal district courts, is that none of the family members state in their affidavits "that they would have presented such testimony in the punishment phase of trial, or that they were even inclined to stay for the whole trial." *Miniel v. Cockrell,* slip op. at 111; Petitioner's Appendix 65, 74. Claims regarding missing witnesses must include such averments to plead a prima facie Sixth Amendment violation. *See, e.g., Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (holding that "to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.") (citations omitted); *United States v. Foster*, 128 F.3d 949, 952 (6th Cir. 1997) (holding that "in order to justify a continuance for the purposes of locating a witness, the moving party must show [among other things] that the witness . . . was available and willing to testify."); *United States v. Olaniyi-Oke*, 199 F.3d 767, 771-72 (5th Cir. 1999) (same). For this reason alone, the lower courts' rejection of this claim was entirely correct.

Further, the state court found, as presumptively correct factual matters under 28 U.S.C. § 2254(e), that counsel "spoke to [Miniel's] family members who were present for part of the trial and that they did not want to participate or get involved; that they did not appear to have warm feelings about the applicant; and that when asked specifically by trial counsel that someone should testify that applicant should not get the death penalty, none of the applicant's family wished to do so." Petitioner's Appendix 74. Thus, faced with a dearth of useful mitigating evidence from either Miniel or his family, counsel instead built a punishment case based on the perception that Miniel had made a sincere effort to reform since his arrest. Specifically, counsel presented the jury with Miniel's good conduct record from the year-and-a-half since Miniel had been arrested. Counsel also adduced testimony from a woman who had visited Miniel in jail, had discussed religion with him, and had formed the opinion that Miniel was sincerely devoted to his faith. Finally, counsel presented testimony from a jail chaplain, who indicated that Miniel had been a devoted attendant of the religious services he administered and who stated that Miniel's attitude had changed during the time he had been in jail. Based on this evidence, counsel could credibly argue that there was no probability that Miniel would pose a continuing threat to society if allowed to live.

The record supports the state courts' conclusion that defense counsel's investigation of Miniel's background was not unreasonable. Counsel sought information from both Miniel and his family regarding potential mitigating evidence, but was unable to uncover any useful information. Indeed, counsel was also concerned that calling family members as witnesses could leave them vulnerable to cross-examination regarding Miniel's juvenile criminal history. Moreover, as noted above, those family members whom counsel encouraged to testify indicated that they did not want to participate in Miniel's trial. This reluctance on the part of the family, coupled with counsel's sense that they did not have "warm feelings" for Miniel and could potentially hurt them on

cross-examination, led counsel to conclude that they would not make good witnesses for the defense. These decisions were certainly reasonable in light of the circumstances and did not fall outside the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As such, the federal district court correctly denied Miniel's claim because the state court's decision was not objectively unreasonable. *Miniel v. Cockrell,* slip op. at 110-13; Petitioner's Appendix 65-66.

Further, even assuming counsel's performance deficient, the lower federal courts correctly found that the "missing" evidence was not of such a character as to produce a reasonable probability that the jury would have answered one of the two special issues in the negative. Specifically, in concluding that the state court decision was not objectively unreasonable, the district court found:

> . . . . During the punishment phase of Miniel's trial, the State introduced evidence of many prior offenses committed by Miniel in Illinois, including aggravated battery with numchucks; two unlawful-use-of-weapons charges; a retail theft charge; and a charge of disorderly conduct. The State also presented evidence of Miniel's poor parole history. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person.
>
> When comparing Miniel's violent history, including the horrific manner in which he killed Manier,[8] with the potential testimony that

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[8] After his brutal murder of Manier and stealing the few things of value he could find, Miniel threatened to kill his accomplice with a shotgun because he had "messed up" and "couldn't do anything right." 25 SR 110-14, 116-19.

centered on childhood abuse and substance abuse, there is no reasonable probability that the jury would have answered the special issues in a different manner. Specifically, Miniel's past violent behavior would overwhelm any of the proposed mitigating evidence in determining future dangerousness. In sum, the proposed mitigation evidence "would have had little mitigating effect against the evidence. . . ." *Lamb [v. Johnson]*, 179 F.3d [352,] at 360 [(5th Cir. 1999)]. Miniel has failed to present "evidence of sufficient quality and force to raise a reasonable probability that, had it been presented to the jury, a life sentence would have resulted." *See Andrews v. Collins*, 21 F.3d 612, 624 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995).

Furthermore, the evidence presented in the family affidavits is not unequivocally mitigating. There is no prejudice to a defendant when counsel fails to present evidence that would have been detrimental to the defense. *See Ransom [v. Johnson]*, 126 F.3d [716] at 724 [(5th Cir. 1997)]; *Cockrum v. Johnson*, 119 F.3d 297, 304 (5th Cir. 1997) (failure to investigate mitigating evidence did not prejudice the defendant because of the double-edged nature of the evidence). "Evidence of a defendant's abuse-filled, violent upbringing and abuse of drugs and alcohol frequently can be 'double-edged.'" *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997), *cert. denied*, 525 U.S. 859 (1998).

Miniel's mitigating evidence may have harmed his defense. For instance, Miniel's sister reveals that at the time of his arrest Miniel confronted the police with a shotgun, only lowering the weapon in

> response to her pleas. Also, the accidents that some members pointed to as deeply impacting Miniel's life occurred as a result of intoxication. Additionally, the affidavits recognize that Miniel had opportunities to seek help for his substance dependency, but did not avail himself of those opportunities. Likewise, the psychological evidence about Miniel's violent tendencies may have confirmed his future danger to society.
>
> The state court determination that trial counsel did not render ineffective assistance in failing to present mitigating evidence is not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

Miniel v. Cockrell, slip op. at 113-15 (internal record citations omitted); Petitioner's Appendix 66-68. Reviewing the claim under *Strickland*, and mindful of this Court's recent decisions in *Wiggins v. Smith*, *supra*, and *Williams v. Taylor, supra*, the lower court found that the correctness of the district court's assessment of the claim was not debatable. *Miniel*, 339 F.3d at 346-48 & n.10.

Miniel argues that the lower court erred in its prejudice analysis because the court failed to weigh the additional mitigating evidence in light of the entire record and improperly limited *Wiggins* and *Williams* to their specific facts. However, the lower court, like the district court before it, properly assessed prejudice on the entirety of the record, specifically including the additional mitigating evidence. *Miniel*, 339 F.3d at 346-48; *Miniel v. Cockrell,* slip op. at 113-15; Petitioner's Appendix 66-68. That the lower court commented on the extent and quality of the additional evidence here as compared to that presented in *Wiggins* and *Williams*, *Miniel*, 339 F.3d at 347 n.10, does not equate to the court limiting *Wiggins* and *Williams* to their specific facts. Rather, the lower court, as the federal district court before it, was simply

not persuaded by the additional evidence in light of the other record evidence in this case. Further, the extent and quality of the additional evidence presented in *Wiggins* and *Williams* were essential to this Court's conclusion in those cases that prejudice was shown. *See, e.g., Wiggins*, 123 S. Ct. at 2542-44 (considering "the nature and the extent of the abuse petitioner suffered"; describing petitioner's life history as "excruciating" and the additional evidence as "powerful").

III. Miniel's Claim Regarding a Mitigating Evidence Instruction Is Not Properly Before the Court.

Miniel complains that the lower court erred in rejecting his claim that the special issues precluded the jury from considering mitigating evidence, contrary to the Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001). However, Miniel entirely fails to allege what mitigating evidence his jury was precluded from considering. Petition at 21. He also entirely fails to brief how the lower courts erred in rejecting this claim. For these reasons, nothing is presented for review.

In any event, the lower courts correctly found that the mitigating evidence actually presented at trial (drug and alcohol use at the time of the offense, youth, good behavior while incarcerated, and religious conversion) was not beyond the scope of the special issues and that Miniel could not premise a *Penry* claim on evidence not presented at trial (emotional trauma upon learning he was adopted, alcoholic father, history of abuse as a child, history of drug and alcohol abuse, a pattern of suicide attempts and substance abuse of family members, and evidence of impairment of mental, academic, social, and behavioral functioning). *Miniel*, 339 F.3d at 337-38; *Miniel v. Cockrell,* slip op. at 86-94; Petitioner's Appendix 50-58. . Moreover, relief is foreclosed under the AEDPA standard of review and *Teague v. Lane*, 489 U.S. 288 (1989).

CONCLUSION

For the foregoing reasons, Miniel fails to prove the lower court erred in disposing of his claims, and certiorari review should be denied.

Respectfully submitted,

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